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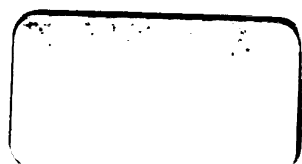
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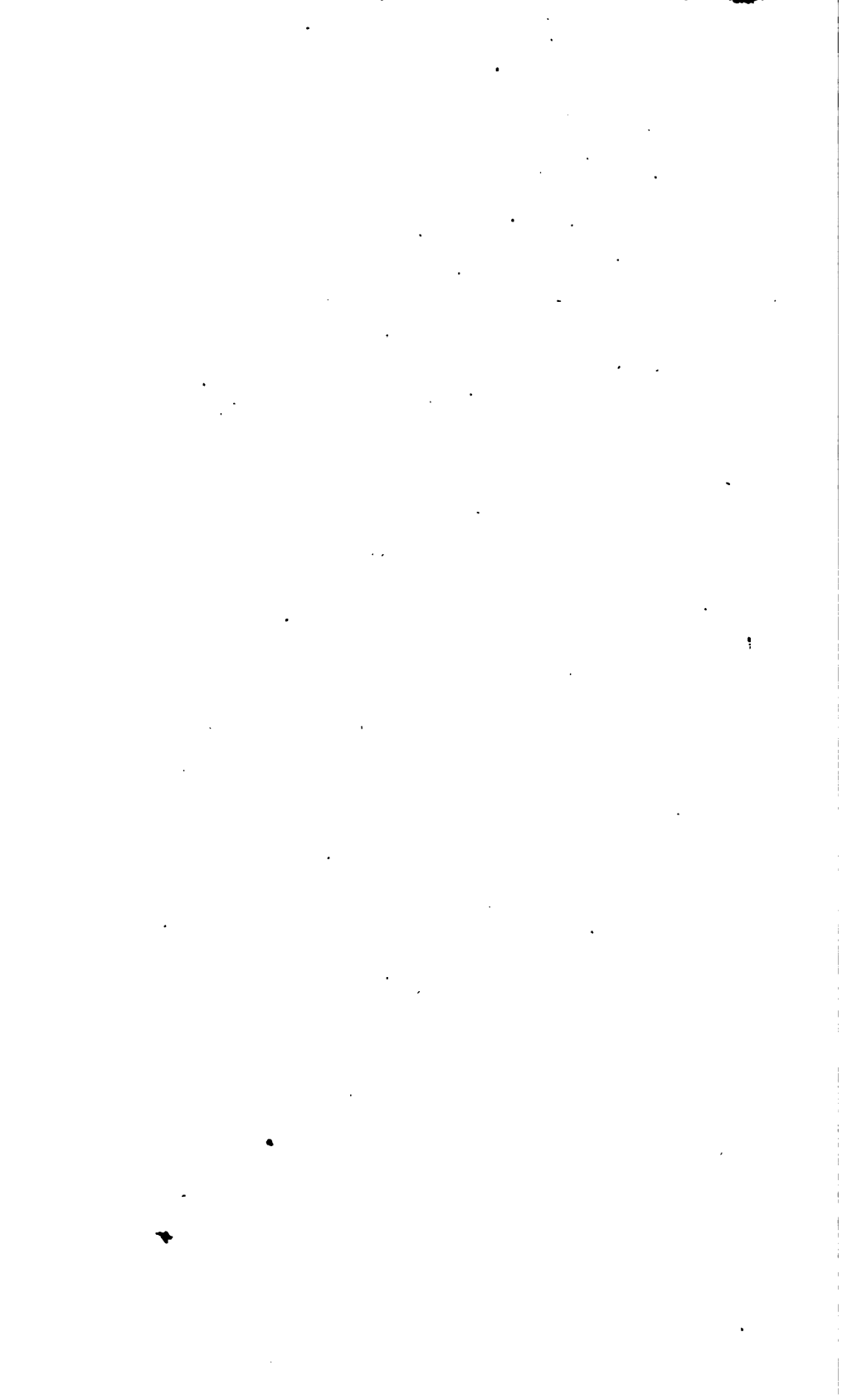
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THE LAW
OF
PRESUMPTIVE EVIDENCE,

INCLUDING PRESUMPTIONS BOTH OF LAW AND
OF FACT, AND THE BURDEN OF PROOF BOTH
IN CIVIL AND CRIMINAL CASES,

REDUCED TO RULES.

BY

JOHN D. LAWSON,

Author of a similar work on "The Law of ~~Expert~~ and Opinion Evidence."

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PREFACE.

The present work, following the method pursued by me in my "Expert and Opinion Evidence," is an endeavor to present the topic of Presumptive Evidence (and incidentally the Burden of Proof), as follows, viz. : 1. A series of rules and sub-rules. 2. A series of illustrations under each rule. 3. A discussion or commentary upon the rule and upon the particular illustration, showing the reasons for the rules themselves, and the grounds upon which the courts have proceeded in giving particular applications to them. The rules are those principles which after an examination of all the cases on the particular subject, I have concluded are *the law*. The illustrations are all taken from decided cases and are, therefore, open to examination and verification by the student or practitioner. The commentary shows the reasoning of the courts in the particular illustrations, and points out the conflict of authorities wherever such conflict exists.

In noticing my book on "Expert and Opinion Evidence"

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the *American Law Review* of November, 1883, says of the plan which I adopted in that and have followed in this: —

“ It has the great advantage of facilitating rapid search and convenient reference, even if no higher merit could be ascribed to it. It has the advantage of showing us that some things in the law at least may be regarded as settled; that these things are capable of being reduced to rules, and that these rules may be printed by themselves in such a way that a judge or practitioner can quickly put his finger upon them. It also has the advantage of cataloguing, so to speak, in brief language, the illustrations of the rules, showing the manner in which the rules have been applied by the courts in cases actually decided.”

“ What, under the circumstances of this case, are the presumptions to be drawn? ” is a question which arises constantly in practice. I have a hope that the number of future cases may be small which will not be found to fall in principle under one or other of the one hundred and thirty-nine rules contained in this book.

J. D. L.

ST. LOUIS, March 1, 1885.

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RULE 113. — Fear, exhibited by the accused, raises a presumption of guilt. But no presumption can arise where the fear may be on account of another act or crime 534

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RULE 115. — The destruction, concealment, or fabrication of evidence by the accused raises a presumption of his guilt — *omnia præsumuntur contra spoliatores* 539

RULE 116. — Silence on the part of the accused when charges are made against him in his presence and hearing, raises a presumption of guilt; unless the charges are made in the course of a judicial interrogation. But the failure of the accused to produce on his trial evidence in his favor and within his power raises a presumption of guilt 545

PART VI.

GENERAL RULES.

CHAPTER XXI.

THE GENERAL RULES AS TO PRESUMPTIONS.

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THE LAW OF
PRESUMPTIVE EVIDENCE

(INCLUDING PRESUMPTIONS BOTH OF
LAW AND FACT)

REDUCED TO RULES.

(1)



PART I.

THE PRESUMPTION OF KNOWLEDGE.

(3)

CHAPTER I.

THE PRESUMPTIONS OF KNOWLEDGE OF LAW AND FACT.

RULE 1. — Every one is presumed to know the law when ignorance of it would relieve from the consequences of a crime or from liability upon a contract.¹

The presumption that every person knows the law is often spoken of, but it is clear that there is no such general presumption. When Mr. Dunning, in arguing before Lord Mansfield, said: "The laws of this country are clear, evident, and certain; all the judges know the laws, and knowing them administer justice with uprightness and integrity," that learned judge replied: "As to the certainty of the law mentioned by Mr. Dunning, it would be very hard upon the profession if the law was so certain that everybody knew it; the misfortune is that it is so uncertain that it costs much money to know what it is, even in the last resort."² "Is it not a mockery," said Mr. Livingston, in his report on the Louisiana Penal Code, "to refer me to the common law of England? Where am I to find it? Who is to interpret it for me? If I should apply to a lawyer for a book that contained it, he would smile at my ignorance, and pointing to about five hundred volumes on his shelves would tell me those contained a small part of it; that the rest was either unwritten or might be found in London or New York, or that it was shut up in the breasts of the judges at Westminster Hall. If I should ask him to

¹ See *Laing v. Colder*, 8 Pa. St. 479; 49 Am. Dec. 533 (1848); *Kay v. Connor*, 8 Humph. 624; 49 Am. Dec. 690 (1848); *Oluff v. Mutual Benefit Life Ins. Co.*, 18 Allen, 306 (1866); *Sherrill v. Hopkins*, 1 Cow. 108 (1823); *Hanrick v. Andrews*, 9 Port. 576 (1839); *Gast v. Drakely*, 3 Gill, 330 (1844); *Oilex v. Gard*, 23 Ind. 212 (1864); *Brown v. Beers*, 6 Conn. 313 (1826); *Cockayne v. Sumner*, 23 Pick. 117 (1839).

² *Jones v. Randall*, Cowp. 38.

examine his books and give me the information which the law itself ought to have afforded, he would hint that he lived by his profession, and that the knowledge he had acquired by hard study for many years could not be gratuitously imparted." Certainty in the law has hardly increased since Lord Mansfield's time, and Mr. Livingston's lawyer would to-day point to a library of five thousand instead of five hundred volumes. We may, therefore, safely say with Mr. Justice Maule, "there is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so," and add, as he did, with a quiet dig at his learned brethren: "If everybody knew the law, there would be no need of courts of appeal, whose existence shows that judges may be ignorant of law."

Illustrations.

I. A. sues B. in trover for property. On the trial evidence is introduced of admissions by B. that the property is A.'s. The presumption is that these admissions were made not only with a knowledge of the facts, but of his legal rights growing out of these facts.¹

II. An action is brought against the makers of a note personally signed by them as trustees of the M. E. Church. The defendants plead, that they were induced to give the note by representations that they would not be individually liable. This is no defense, for the presumption is that they knew their liability.

III. A. having two judgments of different dates against G. issues execution on the second, under which G.'s land is sold to B. A. afterward proceeds against the land under the first judgment, to which B. replies that he had purchased believing the law to be that the sale on the second judgment extinguished the first. This is no defense.²

IV. The drawer of a bill of exchange knowing that time had been given by the holder to the acceptor, but not knowing that this discharged him, and thinking himself still liable, promises to pay it if the acceptor does not. He is bound by this promise though made under a mistake of law.

¹ Butler v. Livingston, 15 Ga. 535 (1854).

² Mears v. Graham, 8 Blackf. 144 (1846).

³ Shotwell v. Murray, 1 Johns. Ch. 512 (1815), and see Champlin v. Layton, 18 Wend. 407; 81 Am. Dec. 383 (1837).

⁴ Stevens v. Lynch, 12 East, 38 (1810), and see Goodman v. Sayres, 2 Jac. & W. 263 (1820); Brisbane v. Daeres, 5 Taunt. 143 (1813); East India Co. v. Tritton, 3 B. & C. 280 (1824); Stockley v. Stockley, 1 V. & B. 23 (1813); Clarke v. Dutcher, 9 Cow. 674 (1824); Warder v. Tucker, 7 Mass. 452 (1811).

V. A statute prohibits the selling of liquor to an intoxicated person, and prescribes a penalty therefor. B. sells liquor to an intoxicated person not being aware of the law. B. is nevertheless liable as he is presumed to know it.¹

VI. A public officer is indicted for extortion in taking a fee before it was due. The fee being due to him after a time in any event, he thought that the law allowed him to take it in advance. This is no excuse and he is convicted.²

VII. A. is indicted for suffering gaming in his house. It appears that A. does not know it is unlawful to permit gaming in his house. His ignorance of the law does not excuse A.³

VIII. A statute requires attorney's bills to inform their clients on their face of the matters transacted and the courts in which the things charged for have been done. A bill delivered to a client contains charges for "perusing decrees and reports at the report office." "Six clerks' office searching for a record." The client will not be presumed to know in what courts these offices are.⁴

IX. At an election, a number of votes are polled for one B., who is acting at the time as returning officer. By the law a returning officer is not eligible as a candidate, and all the voters know that B. is acting in this capacity. There is no presumption that they knew that he is disqualified.⁵

X. A. finds a mortgage on record over thirty years old. The law from lapse of time presumes it paid. If A. purchases the mortgage he is presumed to know that it is presumed to be paid.⁶

XI. A. is sentenced to the penitentiary by a court having no jurisdiction to try him. In an action against the gaoler and contractor for trespass, the law presumes that they knew the law and that they had no right to hold him.⁷

XII. A. having found some property secretes it with intent to defraud the owner contrary to a statute. A. is indicted under the statute for larceny. A. is a negro. The fact that it is the common belief among the negroes in the neighborhood that property belongs to the finder is irrelevant.⁸

XIII. A. deals with a person whom he knows to be a broker. A. is presumed to know that he is acting as an agent for some third person.⁹

¹ *Whitton v. State*, 37 Miss. 379 (1859).

² *Com. v. Bagley*, 7 Peck. 279 (1828). But see *Cutler v. State*, 86 N. J. (L.) 135 (1873) where in a similar case, the conviction was set aside on the ground that the intent was wanting.

³ *Winehart v. State*, 6 Ind. 30 (1854).

⁴ *Martindale v. Falkner*, 2 C. B. 715 (1846).

⁵ *Queen v. Mayor of Tewkesbury*, L. R. 3 Q. B. 629 (1868).

⁶ *Goodwyn v. Baldwin*, 59 Ala. 127 (1877).

⁷ *Pattison v. Prior*, 18 Ind. 440 (1862), and see *Daniels v. Barney*, 22 Ind. 207 (1864).

⁸ *State v. Welch*, 73 Mo. 284 (1880).

⁹ *Baxter v. Duren*, 29 Me. 434; 50 Am. Dec. 603 (1849).

In case I. the trial court had charged the jury that if the admissions were made with a full knowledge of all the facts, and his rights growing out the facts, they were evidence against B. On appeal this was held erroneous. "Until the contrary appears," said Lumpkin, J., "every man is taken to be cognizant of the law. The doubt and difficulty has been not whether the burden of proof is not cast upon him who seeks to screen himself from the effect of his acts by showing that they were done in ignorance of his legal rights; that has never been disputed. And the only question is whether the party will be allowed this excuse. Whereas, in this case it was held that the solemn admissions of fact by B., that the title to this property was not in him but A., did not make even a *prima facie* case as to proof, unless it was shown that he made these admissions with not only a full knowledge of all the facts, but of his legal rights growing out of those facts. Such a doctrine, we apprehend, is not only unsupported by authority, but manifestly against principle."

In case II. it was said: "That representation can not affect the plaintiff's right to recover. It was a representation made to the defendants respecting a question of law, and can not be considered as having misled them. They must be presumed to have known the legal effect of their contract."¹

In case III. it was said: "According to B.'s own showing he was only under a mistake in point of law; and that mistake not being produced by any fraud in A. is not sufficient of itself to affect the former lien or the validity of the sale. * * * In such a case the general doctrine which

¹ In *Storrs v. Baker*, 6 Johns. Ch. 166 (1829), it was said by the chancellor: "The presumption is that every person is acquainted with his own rights provided he has had reasonable opportunity to know them, and nothing can be more liable to abuse than to permit a person to reclaim his property in opposition to all the equitable circumstances which have been stated, upon the mere pretense that he was at the time ignorant of his title." "The courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind." *Lyon v. Richmond*, 2 Johns. Ch. 51 (1816).

we find established must prevail that every man is to be charged with a knowledge of the law."

In case IV. Lord Ellenborough ruled that the defendant could not defend himself upon the ground of his ignorance of the law when he made the promise.

In case V. it was said: "As he is bound to know the law, he is held to the consequences of a willful violation of it whether he knew of its existence or not. Otherwise it would be difficult to punish any man for a violation of law, because it might be impossible to prove that he had knowledge of the law. Hence the legal presumption that every man knows the law, and that his violations of it are willful."

In case VI. it was said: "This is the case of an honest and meritorious public officer who by misapprehension of his rights has demanded a lawful fee for a service not yet performed, but which almost necessarily must be performed at some future time. If we had authority to interfere and relieve from the penalty, we certainly should be inclined to do so, but we are only to administer the law."

In case VIII. it was said: "There comes a charge for perusing decrees and reports at the report office, which it is said the client must know could only be in chancery. I do not agree that the client is to be presumed to know any thing of the kind. Then there is a charge for 'attending at the six clerks' office, searching for a record.' This, it is said, must be in a court of chancery. I really am unable at the present moment to say whether there is or is not such an office now existing as the six clerks' office; and I do not see why Miss Mary Falkner is bound to know it. The bill * * * presupposes the client to possess a considerable knowledge of the law. There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so."

"Every elector," said Blackburn, J., in case IX. "must have known that B. was the mayor, and every elector who saw him presiding at the election must have known as a fact

that he was the returning officer, and every elector who was a lawyer and who had read the case of *Reg. v. Owens*,¹ would know that he was disqualified. From the knowledge of the fact that B. was mayor and returning officer, was every elector bound to know as a matter of law that he was disqualified? I agree that ignorance of the law does not excuse. But I think that in *Martindale v. Falkner* (Case VIII.), Maule, J., correctly explains the law." And Lush, J. added: "A maxim has been cited which it has been argued imputes to every person a knowledge of the law. The maxim is *ignorantia legis neminem excusat*, but there is no maxim which says that for all intents and purposes a person must be taken to know the legal consequences of his acts."²

Case XI. carries this presumption very far. In *Brent v. State*,³ it was ruled that the presumption of knowledge of law did not extend to presuming that a person knew how the courts would construe a statute, and whether it was constitutional or unconstitutional. The defendants here were indicted for conducting a lottery, and showed an act of the Legislature permitting them to do so. The court held the act unconstitutional, but said: "We see no good reason why the State as well as an individual is not to be held bound by this salutary and just maxim that 'no man shall take advantage of his own wrong.'⁴ We think it clear that the appellant did not intend to violate any penal or other law of the State. In other words, that he acted in good faith, and verily believed he was doing what the State, by this statute clearly authorized him to do. But it is insisted, on the part of the State, that everybody is presumed to know the law. This, properly understood, is true, but it is a rule of presumption, adopted from necessity, and to avoid an evil that would otherwise constantly

¹ 2 E. & E. 86. And see *Black v. Ward*, 27 Mich. 191 (1878).

² *Watrous v. Rogers*, 16 Tex. 410 (1856).

³ 43 Ala. 297 (1869).

⁴ *Broom's Legal Maxims*, top page 205.

perplex the courts, in the administration of the criminal law; that is, the plea of ignorance. Hence the maxim, that 'ignorance of the law excuses no one.' The courts and the profession, however, well know that this necessary rule of presumption, is often, and perhaps oftener than otherwise, presuming against the truth. But we think the State presses this necessary rule beyond its proper measure, and insists that the appellant was not only bound to know the existence of the law, but in this case, was presumed to know this special act of the Legislature was, and would be held, unconstitutional, and was, therefore, void and no law. We can not consent to carry this rule of presumption to this extent; it must be confined to presuming that all persons know the law exists, but not that they are presumed to know how the courts will construe it, and whether, if it be a statute, it will, or will not, be held to be constitutional. To extend this rule beyond this limit, will be to implicate the Legislature who passed, and the Governor who approved the act, in a charge of gross immorality and dishonesty. If the appellant is to be presumed to know the act was unconstitutional, the same presumption will fix upon them the same extent of knowledge; that is, that they knew the act, when it was passed and approved, was in conflict with the constitution; and if this be so, it will be a hard matter to clear either from this grave implication. But we are satisfied the rule must have the limit we give it. To hold otherwise, will take from the rule all its virtue, and make it odious to all right and just thinking men."

In case XII. it was said: "The defendant offered evidence to prove that it was a general belief among colored people in that county that money or property found, having no marks upon it to indicate its ownership, belonged to the finder. The court properly excluded the evidence. It is a principle as old as the common law that ignorance of the law is no excuse for its violation; and the law is the same for a colored as for a white person. We have not now a criminal code for the whites and a different one for the

blacks. Under our present constitution no law making such a distinction would be of any validity. Wharton's Crim. Law, sec. 88, p. 1794, is cited as sustaining the proposition that taking possession of money and determining to keep it under an honest belief of a right to do so because found, is a good defense. There is no section 88 at page 1794, and the sections on that page do not relate to the subject under consideration, but section 87, page 87, asserts the general proposition that 'ignorance or a mistake of fact is admissible for the purpose of negating a particular intention,' and that 'when a particular intent is necessary to constitute the offense (*e.g.*, in larceny, *animus furandi*, in murder, malice), then ignorance or mistake is evidence to cancel the presumption of intent and to work an acquittal either total or partial.' But in section 88, he says: 'When a statute makes an act indictable irrespective of guilty knowledge, then ignorance of fact is no defense.' On this proposition some learned authors differ in opinion from Mr. Wharton.¹ However this may be, the section of our criminal code in question makes it a felony in a finder of goods or money belonging to another to convert them to his own use with intent to defraud the owner, or to make way with, or secrete them with that intent; and proof of ignorance of the law, or that the finder believed that he acquired the title by finding the property, does not tend to disprove the intent to convert it to his own use. If he did the act with the double intent named in the section, it is no defense that in his ignorance of the general law he supposed that by finding he became the owner of the property. It would be no defense that he was ignorant of the section under which he was indicted, which of itself apprises him that lost property does not belong to the finder, and why his ignorance of the general law to the same effect should avail him as a defense, is beyond our comprehension. By imposing a severe punishment upon the finder who converts to his own use

¹ Bishop, 4 South. Law Rev. (N. S.) 58.

the property of another, direct information is imparted that such does not become his by such finding. This is the import of the language of the section, and it is in harmony with a legal principle well established long before that section was enacted. It will not be contended that ignorance of the statutory provision will excuse its violation, and if ever ignorance of the law could constitute a defense it certainly will not do so when the identical section under which the accused is prosecuted informs him of the very principle of law of which he avers his ignorance."

So a suitor in court is presumed to know all the proceedings which take place in his case.¹ And the terms of the Supreme Court of a State being fixed by statute, parties to a cause in the courts of such State are presumed to know the terms of the Supreme Court.² So parties are presumed to know the contents of the public records³ and a member of a municipal corporation is presumed to be aware of its by-laws and ordinances.⁴ But the officers of a municipal corporation are not presumed to be acquainted with the contents of all the official records. L. brings an action against the mayor and clerk of the city of A. for a libel. The libel consists in a statement in their annual report that there is due from L., as tax collector, a certain sum. The statement is incorrect, as shown by the municipal records. There is no presumption that the defendants knew this to be so.⁵ The presumption of knowledge of law may be rebutted. "For instance, if there be an intention to pass a freehold estate, and the vendee accepts a deed of feoffment without livery, he will be relieved upon the ground that he was under a mistake as to the law, for the intention being clear, the failure to effect it makes the mistake manifest, and rebuts the presumption. It is different, however, where the intention is carried into effect, because in such

¹ *Gauldin v. Shehee*, 20 Ga. 531 (1856).

² *Loomis v. Riley*, 24 Ill. 307 (1860).

³ *Lancey v. Bryant*, 30 Me. 466 (1849).

⁴ *Palmyra v. Morton*, 25 Mo. 598 (1857).

⁵ *Hart v. Roper*, 6 Ired. (Eq.) 849 (1849).

cases there is nothing to rebut the presumption, and the ignorance of the party can only be shown by going into proof, which is not admissible.¹

RULE 2. — But there is no presumption of knowledge of private or foreign laws.

Illustrations.

I. B. is a teacher in a public academy and expels a scholar for disobedience. The by-laws of the academy provide that no pupil shall be expelled but by order of the Board of Trustees. There is no presumption that P. knew of the existence of this by-law.²

II. A. dies in Massachusetts leaving real estate there and in New York. His heirs are a niece, a child of one of his sisters, and three nephews, the children of another sister. By the laws of Massachusetts, the four heirs are entitled to share in equal proportions, but by the laws of New York the niece is entitled to one-half and the nephews to one-sixth. The heirs divide the New York property equally amongst them, but afterward discovering that she was entitled to a larger share, the niece brings suit to have the settlement set aside. She can recover, as she is not presumed to know the law of New York.³

In case II. it was said: "In all civil and criminal proceedings every man is presumed to know the law of the land, and whenever it is a man's duty to acquaint himself with facts, he shall be presumed to know them. But this doctrine does not apply to the present case. It was not the duty of the plaintiff to know the laws of New York, nor does ignorance of them imply negligence. * * * The parties knew in fact that the intestate died seized of estate situated in the State of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But are they bound at their peril to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be known to the

¹ *Boyers v. Pratt*, 1 Humph. 90 (1839).

² *Haven v. Foster*, 9 Pick. 113 (1829).

³ *King v. Doolittle*, 1 Head, 77 (1855).

court by proof like other facts, why should not ignorance of them by private individuals have the same effect upon their acts as ignorance of other facts? *Juris ignorantia est cum jus nostrum ignoramus*, and does not extend to foreign laws or the statutes of other States. This rule does not extend to special or private laws which are only intended to operate on particular individuals, as for example a private bank charter. Nor does it extend to foreign laws or the laws of other States.¹ 'In some cases,' said Mr. Justice Washington in an early case, 'a foreigner is not bound to take notice of foreign revenue laws. For if he makes a firm and final contract, completed in his own or a foreign country, it is nothing to him whether a use may or may not be made of the contract in violation of the revenue laws of a foreign country. In the case of *Hollman v. Johnson*,² the sale was completed in France, and the vendor was in no respect concerned or aiding in the illicit use intended to be made of the goods, though he knew of such intention. Not so, as to a citizen who though the contract be complete, yet if he be knowingly instrumental to a breach of the laws of his own country he can not have the aid of those laws. * * * But if the contract of the foreigner is to be completed in or has a view in its execution in a foreign country, he is bound to take notice of them.'

RULE 3. — Persons engaged in a particular trade are presumed to be acquainted with the value of articles bought and sold therein (A), the names under which they go in such trade (B), and the general customs obtaining and followed there (C).

Illustrations.

A.

I. A person takes some bank bills to a banker to be exchanged for gold, and the banker, after examining them buys them from him at a discount.

¹ *Cambiose v. Maffet*, 2 Wash. C. C. 104 (1807).

² Cowp. 341.

Afterwards discovering that one of the bills is worthless, he brings an action for the money he paid for it. He can not recover, there being no evidence of fraud or knowledge on the customer's part. The banker is presumed to be acquainted with the value of the bills purchased by him.¹

B.

I. D. imports into New York a quantity of spelter, which under the name of tutenague is exempt from duty. The collector, however, claims and receives a duty of 20 per cent thereon, and subsequently D. sells the spelter to M. at long price, which by custom gives a purchaser the right to any drawback on duty which may be made. Afterward the collector decides that spelter is not dutiable, and pays back to D. the 20 per cent. In an action by M. claiming this duty M. can not recover, as the presumption is that both M. and D. knew at the time of the sale that the article was not dutiable.²

"It is a reasonable presumption," it was said in case I., "that those who are dealing in articles of commerce, especially those who purchase by wholesale from the importers, are acquainted with the different names by which such articles are known to the commercial world. And if spelter was actually exempted from duty by the names used in the section of the statute relative to exempt articles, probably both parties to this sale had reason for believing that the claim made by the collector was unfounded and that it would probably be reversed, and the duties be refunded to the importer. If so, the purchaser should have made his contract with reference to that event, so as to secure for himself the benefit of the refunded duty in case it should turn out that the collector was wrong."

C.

I. A. employs B., a broker, to trade for him on the Stock Exchange. The general rules of the Exchange are presumed to be known to A., and B. has an implied authority to contract in accordance therewith.³

II. It is the general custom in a certain trade to charge interest on accounts after a fixed time. Parties dealing therein are presumed to be cognizant of this custom, and are bound by it.⁴

¹ *Hinckley v. Kersting*, 21 Ill. 247 (1859).

² *Moore v. Des Arts*, 2 Barb. Ch. 636 (1848).

³ *Sutton v. Tatham*, 10 Ad. & Ell. 27; *Bayliffe v. Butterworth*, 1 Ex. 25.

⁴ *McAllister v. Reab*, 4 Wend. 428, 8 Id. 109; *Meech v. Smith*, 7 Id. 315.

III. It is the general custom of a bank to demand payment of notes and give notice on the fourth instead of the third day after they are due. Persons negotiating notes at this bank, or making commercial paper for the purpose of having it negotiated there, are presumed to know this custom.¹

IV. A dry goods salesman sues B., his employer, for wrongful dismissal. There is a general custom in the dry goods trade, that when a clerk or salesman begins a season without a special contract, he can not be dismissed until the end of it. Both A. and B. are presumed to know this custom.²

All trades have their usages, and when a contract is made with a man about the business of his craft, it is framed on the basis of such usage, which becomes a part of it, unless there is an express stipulation to the contrary.³

In case I. it was said: "A person who deals in a particular market must be taken to deal according to the custom of that market, and he who directs another to make a contract at a particular place must be taken as intending that the contract may be made according to the usage of that trade."

In case II. it was said: "The uniform custom of a merchant or manufacturer is presumed to be known to those in the habit of dealing with him, and in their dealings they are supposed to act in reference to that custom."

In case III. it was said: "The parties are bound by such usage whether they have a personal knowledge of it or not.

¹ *Mills v. Bank of U. S.*, 11 Wheat. 481; *Renner v. Bank of Columbia*, 9 *Id.* 592; *Bank of Washington v. Triplett*, 1 Pet. 25; *Yeaton v. Bank of Alexandria*, 5 Cranch, 9; *Smith v. Whiting*, 12 Mass. 6; *Dorchester, etc., Bank v. New England Bank*, 1 Cush. 177.

² *Given v. Charron*, 15 Md. 502, and see *Lyon v. George*, 44 Md. 235.

³ *Pittsburg v. O'Neil*, 1 Penn. St. 343; *Bindskoff v. Barrett*, 14 Iowa, 101; *Beatty v. Gregory*, 17 *Id.* 109; *Toledo, etc., Insurance Co. v. Speares*, 16 Ind. 52; *Grant v. Lexington Fire Insurance Co.*, 5 *Id.* 23; *Barrett v. Williamson*, 4 McLean, 589; *Greaves v. Legg*, 11 Ex. 642; 2 H. & N. 210. In a New York case *Folger, J.*, said: "There are cases of principal and agent where one has been sent by another to do acts in a particular business to be done at a particular locality—as on Stock Exchange—where the power to deal is a privilege obtained by the payment of a fee, and is restricted to a body which has for its regulation and government come under certain prescribed rules or established usages; and as the agent could not do the will of his principal nor could the principal himself, save in conformity with those rules or usages, it is held that the principal must be bound thereby, whether cognizant of them or not, and that ignorance will not excuse him." *Walls v. Bailey*, 49 N. Y. 464

In the case of such a note the parties are presumed by implication to agree to be bound by the usage of the bank at which they have chosen to make the security itself negotiable." It must be borne in mind, however, that this knowledge is presumed only where the custom is a general and notorious one. A local, special custom in a particular trade is not presumed to be known even to persons doing business therein.¹

RULE 4. — The contents of a writing signed by a party himself, or by another at his request, are presumed to be known to him (A), and so of a paper drawn up by one for another (B), and the matters referred to in such writing (C).

Illustrations.

A.

I. An action is brought against F. on a written contract. S. testifies that he signed it at F.'s request for him, as F. could not write, but he does not remember whether or not the contents were read over or explained to F. The presumption is that F. knew the contents.²

II. A. signs an agreement to take shares in a projected railroad, thinking that he would not be called on to pay until the road was completed. Afterwards he finds out that the agreement calls for payment at once. In an action against him A. is presumed to have been acquainted with the contents of the paper.³

III. A. signs a promissory note which has no date, the payee afterwards filling in a date prior to the time of A.'s signing. The presumption is that A. knew that the note was not dated.⁴

IV. A. signs a will with his mark. The presumption is that A. knows its contents.⁵

¹ *Miller v. Burke*, 68 N. Y. 635; *Flynn v. Murphy*, 2 E. D. Smith, 378; *Farmers, etc., Bank v. Sprague*, 52 N. Y. 605; *Pierpont v. Fowle*, 2 Woodb. & M. 23; *Smith v. Gibbs*, 44 N. H. 836.

Harris v. Story, 2 E. D. Smith, 363 (1854).

² *Clem v. R. Co.*, 9 Ind. 439 (1857).

³ *Androscoggin Bank v. Kimball*, 10 Cush. 374 (1852).

⁴ *Doran v. Mullen*, 73 Ill. 342 (1873). Signing a paper as a witness creates no presumption that he knew its contents. *Hill v. Johnston*, 3 Ired. (Eq.) 433 (1844).

In case IV. it was said: "The will is found with his signature to it, and the presumption is that he did not sign it without knowing its contents. Such is the usual presumption in reference to all instruments, and we are aware of no distinction between persons who can and who can not write."

(B.)

I. A., an attorney, has a claim against B. for professional services. B. afterward forms a partnership with C., A. drawing up the articles. A. afterward brings suit on the claim against the firm. A. is presumed to know the terms of the partnership between B. and C.¹

II. A. is the payee of a promissory note signed by B. and C. A. is presumed to know the relation of the parties to the note, as that C. signed simply as surety.²

(C.)

I. An assignment is made of a patent for an "horological cradle," the date of the patent being recited in the deed. In an action on a note given for purchase-money, it turns out that the patent is not for an "horological cradle," but only for an ornament for a such a machine. The presumption is that purchaser examined the patent and knew this.³

In case I. it was said: "The assignments refer specifically to the patent by date, and it may not be a very violent presumption to suppose that the purchasers examined it to see what they were buying. Should I buy a piece of land of a party by some general description, which, without some reference to something else, would be unintelligible, but in my deed reference is made to the original patent by which it was conveyed by the government to my grantor, the description would become as certain, definite and satisfactory as if that description were copied into my deed, and nothing short of positive proof of a fraud, or clear mistake, would remove the presumption that I had examined or understood the contents of the patent."

¹ *Burrett v. Dickson*, 8 Cal. 113 (1857).

² *Ward v. Stout*, 33 Ill. 399 (1863).

³ *Myers v. Turner*, 17 Ill. 179 (1855).

RULE 5. — The burden of proof is on the party to show a material fact of which he is best cognizant.¹

Illustrations.

I. A suit is brought by R. and S. as partners in the firm of R. B. & Co.. The defendant alleges that all the partners in the firm have not been joined. The burden is on the plaintiff to show that they have.²

II. A. after coming of age settles with his guardian and receives money in the hands of his guardian derived from the sale of real estate. The presumption is that he received this money with knowledge of whence it came.³

III. There is an old well on C.'s premises into which the horse of N. falls, and is killed. It is covered with weeds and grass so as to be unseen. The presumption is that C. knows it is there.⁴

IV. An action is brought against B. for marrying a minor without the consent of her parent or guardian. The burden is on B. to show this consent.⁵

V. A statute prohibits the sale of liquor except for certain purposes. B. is charged with selling liquor. The burden is on B. to show that the liquor sold was sold for the excepted purposes.⁶

VI. A statute requires railroad companies to fence their tracks except where the owners of the adjoining lands have fenced or agreed with the company to do so. A railroad company is sued for negligence in killing stock on an unfenced part of their line. Their defense is that they were not required to fence as the owner of the land had agreed to. The presumption is that there was no such contract and the burden is on the railroad to prove it.⁷

“It is the opinion of the court,” it was said in case I., “that the *onus probandi* was on the plaintiff to establish the fact that they alone composed the firm of R. B. & Co. because the name of B. used in the sign of the firm implied that he was a real person, and a partner in interest in the

¹ Ford v. Simmons, 13 La. Ann. 397 (1858).

² Rugely v. Gill, 15 La. Ann. 509 (1860), and see Bowman v. McElroy, 15 Id. 963 (1860).

³ Corwin v. Shoup, 76 Ill. 246 (1875).

⁴ Nelson v. Central R. Co., 48 Ga. 152 (1873).

⁵ Medlock v. Brown, 4 Mo. 379 (1836).

⁶ Hacbaugh v. City of Monmouth, 74 Ill. 367 (1874). So a party indicted for selling liquor without a license must show that he had a license. Bliss v. Brainard, 41 N. H. 236 (1860), State v. Foster, 23 N. H. 348 (1851).

⁷ Great Western R. Co. v. Bacon, 30 Ill. 347 (1863).

concern; and if so he should have been joined as a party plaintiff in the action. But if the name of B. in the style of the firm were a mere fiction, then the fact should have been proved by the plaintiffs, because they were not only more cognizant of the fact, but the evidence of it, perhaps, was in their exclusive possession. The burden of proof is on the party who has to support his case by proof of a fact of which he is supposed to be the most cognizant."

In case III. it was said: "The presumption of law is that the owner of the lot knew that the well was on it; as the owner when in possession is presumed to know the condition of his own property, if a natural person, or by its agents or employees, if an artificial one."

In case VI. it was said: "This count is on the statute which requires the railroad company to fence its road where it runs through enclosed lands, except where it is fenced by the proprietor, or where the company has a contract with the proprietor of the lands that he shall fence the road. The mule was killed by a train on the defendant's road, at a place where it passes through enclosed grounds, and where it is not fenced, and the only question is, whether it was the duty of the plaintiff to prove that there was no contract between the company and the proprietor of the land that he should fence the road. The statute requires, in general terms, all railroad companies to fence their roads, and then makes several exceptions, one of which is when it runs through enclosed lands, the proprietor of which has agreed to fence it. We have repeatedly held that it is necessary, in pleading, to negative all these exceptions. Whether it is necessary for the plaintiff to prove these negative averments, must depend upon their nature and character. When it is as easy for the plaintiff to prove the negative as it is for the defendant to disprove it, then the burden of proof must rest upon him, as that the place where the animal was killed was in a town or village, or was not more than five miles from a settlement; but where the means of proving the negative are not within the

power of the plaintiff, but all the proof on the subject is within the control of the defendant, who, if the negative is not true, can disprove it at once, then the law presumes the truth of the negative averment, from the fact that the defendant withholds or does not produce the proof, which is in his hands if it exists, that the negative is not true. In other words, the burden of proof is thrown upon the defendant to prove the affirmative against the negative averment. There are cases between these extremes, where the party averring a negative, is required to give some proof to establish it. Indeed, it is not easy to lay down a general rule by which it may be readily determined, upon which party the burden of proof lies, when a negative is averred in pleading. Each case may depend upon its peculiar characteristics, and courts must apply practical common sense in determining the question. When the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party thus in possession of the proof should be required to adduce it, or upon his failure to do so, we must presume it does not exist, which of itself establishes the negative. Such is the case here. If the railroad company has a contract with the proprietor of this land that he shall fence it, it is no trouble to produce it, and thus exonerate itself from the liability to build the fence. If the defendant does not produce such a contract the presumption is that none exists."

Where a party asks equitable relief on certain facts, and the defendant answers that he has no knowledge of such facts, the complainant must prove them;¹ and where a party seeks to avoid the effect of a promise made by him

¹ *Halley v. Lacey*, 1 *Sawm.*, 498 (1852).

on the ground that he was ignorant of material facts the burden is on him to show this.¹

RULE 6. — The burden of proof of notice to a bona fide purchaser is on the person alleging such notice.

Illustrations.

I. P. employs V. as agent to build a vessel for him, furnishes him with funds therefor, but instructs him to conceal his, P.'s, ownership. V. makes the contracts in his own name, and registers the vessel as his own. When it is completed he sells it to C. and pockets the purchase-money. In an action by P. against C. the burden of proving that C. had notice of P.'s rights is upon P.²

RULE 7. — There is no presumption that a person not called as a witness has any knowledge of facts.

Illustrations.

I. In an action at law, one B., whose name is mentioned by witnesses in the cause of the trial, is not produced as a witness. The jury have no right to presume any thing as to his knowledge of any facts important to the case.³

In case I. it was said : "The circumstance that a particular person who is equally within the control of both parties is not called as a witness is too often made the subject of comment before the jury. Such a fact lays no ground for any presumption against either party. If the witness would aid either party, such party would probably produce him. As he is not produced the jury have no right to presume anything in respect to his knowledge of any facts in the case, because they are to try the case upon the facts shown in evidence, and upon them alone, without attempting to guess at what might be shown, if particular persons were produced by the parties."

¹ *Burton v. Blin*, 23 Vt. 153 (1851).

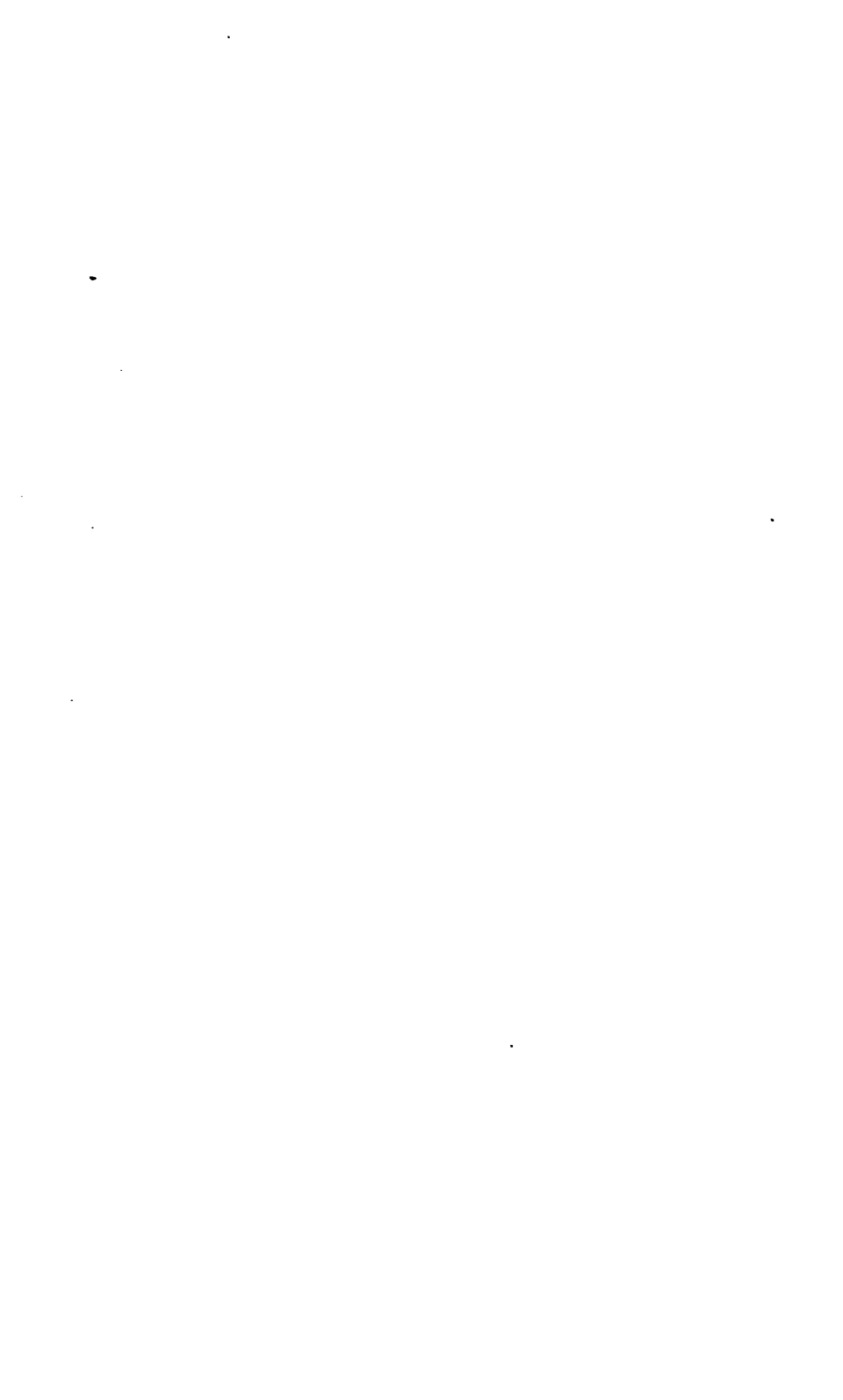
² *Calais Steamboat Co. v. Van Felt*, 2 Black, 273 (1863).

³ *Scovill v. Baldwin*, 27 Conn. 317 (1856).

PART II.

**THE PRESUMPTIONS OF REGULARITY
AND INNOCENCE.**

(25)



CHAPTER II.

THE REGULARITY OF JUDICIAL ACTS.

RULE 8.—Where a court having general jurisdiction acts in a case, its jurisdiction to so act will be presumed.¹

Illustrations.

I. In a suit in a court of chancery, a grant of administration by a probate court was objected to as invalid. The order of this court granting letters of administration did not show that the decedent died intestate, or that his last residence was in the county in which the grant was made. These requisites to the jurisdiction of the court will be presumed.²

In case I. it was said: "Our courts of probate are not inferior in the technical sense of that term, as used of the subject at common law, nor is this jurisdiction special and limited; on the contrary it is general, original, and exclusive. In the exercise of such a jurisdiction, these courts are entitled to the presumption that what they do is rightly done and on just grounds."

RULE 9.—But where the proceedings are taken by an inferior court (A), or are under a special authority granted to any tribunal in a special case or for special purposes (B), or are not according to the course of the common law (C), the jurisdiction is not presumed but must be shown.³

Nothing shall be intended to be out of the jurisdiction of

¹ *Markel v. Evans*, 47 Ind. 326 (1874); *Butcher v. Bank of Brownsville*, 2 Kas. 80 (1863); *State v. Lewis*, 22 N. J. (L.) 564 (1848); *Railway Co. v. Ramsay*, 22 Wall. 322 (1874); *Palmer v. Oakley*, 2 Doug. (Mich.) 47; 47 Am. Dec. 1 (1847); *Horne v. State Bk.*, 1 Ind. 130; 48 Am. Dec. 355 (1848); *Mechanics', etc., Bk. v. Union Bank*, 22 Wall. 576 (1874); *Davis v. Hudson*, 29 Minn. 28 (1881); *Reed v. Vaughan*, 15 Mo. 141 (1851); *Hays v. Ford*, 55 Ind. 62 (1870); *Hahn v. Kelly*, 24 Cal. 400 (1868); *Wallace v. Cox*, 71 Ill. 548 (1874).

² *Brien v. Hart*, 6 Humph. 131 (1845); and see *Kilcrease v. Blythe*, 6 Id. 379 (1845).

³ *Thatcher v. Powell*, 6 Wheat. 127; *Kempe v. Kennedy*, 5 Cranch, 173; *Jackson v. New Milford Bridge Co.*, 24 Conn. 268 (1867); *Felton v. Palmer*, 13 Ohio, 209 (1844); *Goulding v. Clark*, 24 N. H. 148 (1856); *Palmer v. Oakley*, *ante*.

a superior court, but that which specially appears to be so, and nothing will be presumed to be within the jurisdiction of inferior courts, but that which is expressly alleged.¹ "It is a general rule," said Wightman, J., "that all judicial acts exercised by persons whose judicial authority is limited as to locality must appear to be done within the locality to which the authority is limited."²

"It is undoubtedly true," say the Supreme Court of the United States in *Galpin v. Page*,³ "that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly; all intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears; and this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The former will generally appear from the character of the judgment, and will be determined by the law creating the court or prescribing its general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant or his appearance in the action. But when the former exists the latter will be presumed. This is familiar law and is asserted by all the adjudged cases. The rule is different with respect to courts of special and limited authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face."

¹ *Peacock v. Bell*, 1 Saund. 74.

² *R. v. Totness*, 11 Q. B. 80 (1849); *Dempster v. Farnell*, 4 Scott, N. R. 30 (1841); *King v. Fell*, 1 Bald. 338 (1830); *Swain v. Chase*, 12 Cal. 233 (1859); *Bosworth v. Vandewalker*, 53 N. Y. 597 (1873); *Spear v. Carter*, 1 Mich. 19; 48 Am. Dec. 688 (1847); *McClure v. Hill*, 38 Ark. 273 (1880); *Keep v. Grannis*, 3 Nev. 548 (1867). In *R. v. Gouche*, 2 Salk. 441, the Court of King's Bench ruled that the jurisdiction of magistrates would be presumed until the contrary was shown. A different conclusion was reached in *R. v. Helling*, 1 Strange, 7, decided in 1780. The latter ruling was affirmed by Lord Kenyon in *King v. Inhabitants of Hulecott*, 6 T. R. 535, in the year 1796, after a review of all the earlier authorities.

³ 18 Wall. 364 (1873).

The meaning of "inferior court" in the above rule, is not, as will have been observed from the language just quoted, the broad meaning which this phrase sometimes bears. By an "inferior court," is meant one with only limited jurisdiction; a court with general jurisdiction is not an "inferior court" within the rule, because an appeal may lie from its decision to a higher tribunal. In the appellate court the presumption always is that the court from which the appeal is taken has not erred, and this presumption must be removed by proof before the court will reverse the proceedings below.¹ "A revisory court never presumes that an inferior tribunal has erred. The presumption is that it has not. Until the contrary is shown by record every court is presumed to have acted and decided correctly."² As superior courts within rule I. are included, all courts of the common law and created by statute having general common-law jurisdiction; also a court Palatine of a county,³ a court of chancery,⁴ court of probate,⁵ a county court in Illinois.⁶ On the other hand these are inferior courts within the rule, viz.: a justice of the peace,⁷ a magistrate whose authority is restricted by locality,⁸ a county court in Iowa.⁹

In a Connecticut case¹⁰ it is said: "If by a court of general jurisdiction is meant one of unlimited powers, then we have none such in this State nor do we know of any elsewhere. And if by a court of limited jurisdiction is meant one whose powers are subordinate to some other court, then all but courts of *denier resort* are of this character. Such is not the sense in which this subject has been understood

¹ *State v. Parish*, 23 Miss. 433 (1852).

² *Wagers v. Dickey*, 17 Ohio, 439 (1848); *Coil v. Willis*, 18 *Id.* 33 (1849).

³ *Peacock v. Bell*, 1 Saund. 74.

⁴ *Hoppers v. Fisher*, 3 Head, 253 (1855); *Kilcrease v. Blythe*, 6 Humph. 379 (1845).

⁵ *Brien v. Hart*, 6 Humph. 131 (1845); *Redmond v. Anderson*, 18 Ark. 449 (1857).

⁶ *People v. Cole*, 84 Ill. 327 (1876).

⁷ *Swain v. Chase*, 12 Cal. 363 (1859); *Van Eltten v. Jilson*, 6 *Id.* 19; *Whitewell v. Barbour*, 7 *Id.* 64.

⁸ *R. v. Totness*, 11 Q. B. 80 (1849); *R. v. Bloomsbury*, 4 El. & B. 520 (1854).

⁹ *County of Mills v. Hamaker*, 11 Iowa, 206 (1860).

¹⁰ *Fox v. Hoyt*, 12 Conn. 491; 31 Am. Dec. 763 (1838).

either in England or in this country. We think that a court of record proceeding according to the common law of the land, and whose judgments may be revised by writ of error is a court whose proceedings and judgments impart verity and until reversed will protect all who obey them, and in this respect there is in this State no distinction between courts of justices of the peace and the county and superior courts. In this sense the courts of common pleas of New Jersey, Massachusetts, Vermont and Ohio have been considered as courts of general jurisdiction.¹ Between all these courts and mere special tribunals, such as commissioners on insolvent estates, committees, military tribunals and many others which are not courts of record and are established for some special and perhaps temporary purpose, there exists a very marked distinction in regard to the credit and sanction to which their proceedings are entitled and the immunities which may be claimed by themselves, and such as act under them.”

Illustrations.

A.

I. A statute gives justices of the peace power to take the examination of a soldier quartered in the place where the examination is taken. An examination of a soldier taken before two magistrates is offered in evidence, but it does not show where the soldier was quartered at the time. There is no presumption that he was quartered at the place where the examination was taken, and it is admissible.²

“The rule,” said Holroyd, J., in case I., “that in inferior courts and proceedings by magistrates, the maxim *omnia præsumuntur rite esse acta* does not apply to give jurisdiction has never been questioned. Here then the jurisdiction should at all events have appeared on the face

¹ *Oting Kempe v. Kennedy*, 5 Cranch, 173; *Wheeler v. Raymond*, 8 Cow. 311; *Harrod v. Barretto*, 1 Hall, 155; *Watkin's Case*, 3 Pet. 193; *Voorhees v. U. S. Bank*, 10 Pet. 474; *Betts v. Bagley*, 12 Pick. 573; *Foot v. Stevens*, 17 Wend. 488; *Watson v. Watson*, 9 Conn. 144; *Hall v. Howd*, 10 Conn. 514.

² *King v. Inhabitants of All Saints*, 7 B. & C. 785 (1838).

of the examination, supposing proof of it *aliunde* not to have been necessary."

B.

I. A statute gives to county courts power to order the sale or partition of real estate of an intestate where the heirs can not agree upon a division or one of them is a minor. Under this law a county court partitions certain land. Its act is attacked. There is no presumption that everything necessary to the validity of the judicial act has been done.¹

II. A statute provides that a magistrate shall have power to call a meeting of a corporation upon the petition of three or more proprietors owning one-twentieth of a property. There is no presumption that such a meeting called by a magistrate was done on the petition of such proprietors.

III. By the law of New Jersey the acknowledgment of a deed of lands lying in the State can be taken in another State, only where the grantor whose acknowledgment is taken resides in such State. A deed of lands in New Jersey is acknowledged before a commissioner in New York. There is no presumption that the grantor resided at the time in New York.²

IV. The Board of Aldermen of a city are constituted by statute a court for the purpose of trying a city officer on charges preferred. The statute requires the aldermen to be duly sworn as such court. In a proceeding to set aside their finding, there is no presumption that they were sworn.³

In case I. it was said: "It is an important question in this cause whether the proceedings of this court upon a petition to divide the real estate of an intestate under the act be proceedings under a special authority delegated to this court in a particular case or whether they be proceedings under its general and ordinary jurisdiction, as a court of law or a court of equity. If the latter be the case, many things may be presumed which do not appear on the record nor in the evidence produced; nor will evidence be permitted to contradict the presumption arising from the acts of the court as they appear upon the record. Thus, after a court has

¹ *Tolmie v. Thompson*, 3 Oranch C. C. 123 (1827).

² *Goulding v. Clark*, 34 N. H. 148 (1856).

³ *Graham v. Whitely*, 26 N. J. (L.) 262 (1857).

⁴ *Tompert v. Lithgow*, 1 Bush, 176 (1886).

ordered a sale in the exercise of its general and ordinary jurisdiction, it would be presumed that the court had satisfactory evidence of every prerequisite to justify the court in making the order, and such presumption would continue so long as the order of the court should remain unreversed. On the contrary, if the proceedings be under a special authority delegated to this court in a particular case and not under its general jurisdiction as a court of common law or of equity, nothing material can be presumed. The person claiming title under such proceedings must show them to be regular, and in which the court had jurisdiction and was authorized to do what was done. By the Maryland Act of Descents, the chancellor has original jurisdiction only in the case where the lands to be divided lie in different counties. If the land lie entirely in one county, the county court alone has jurisdiction of the case. This court, therefore, can exercise jurisdiction in the present case only as being substituted for the county court. It is a special jurisdiction given to a court of law in a particular case."

"There is no presumption," it was said in case II., "in favor of the jurisdiction of inferior courts or magistrates, or persons vested with special powers; but their authority must be shown."

In case III. it was said: "It is insisted, however, that the presumption of law is that the officer acted correctly, and within the scope of his authority. The principle undoubtedly prevails as applied to judicial proceedings in courts of general jurisdiction; but the maxim, *omnia præsumentur rite esse acta*, does not apply so as to give jurisdiction to magistrates, and to persons exercising a special, limited, or mere statutory authority."

In case IV. it was said: "The Board of Aldermen could only become a court to try charges preferred against a city officer upon being duly sworn; and being a court of the most limited jurisdiction — indeed having jurisdiction as a court only for the purpose of the trial and removal of offi-

cers — everything essential to make it such a court must appear affirmatively, and no intendment or presumption in its favor can be indulged.”

C.

I. By a State statute service of process by publication is substituted in place of personal citation in proceedings against persons without the State. That the statute has been strictly followed must be proved, and no presumption of jurisdiction will be indulged in.¹

“ When the special powers conferred,” it is said in case I., “ are brought into action according to the course of the common law, *i.e.*, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers.” But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record. The extent of the special jurisdiction, and the conditions of its exercise over subjects or persons necessarily depend upon the terms in which the jurisdiction is granted, and not upon the rank of the court upon which it is conferred. Such jurisdiction is not therefore the less to be strictly pursued, because the same court may possess over other subjects or other persons a more extended and general jurisdiction.”

¹ *Galpin v. Page*, 18 Wall. 364 (1873); *Jordan v. Goblin*, 12 Cal. 100; *Ricketson v. Richardson*, 26 *Id.* 149; *McMinn v. Whelan*, 27 *Id.* 300; *Morse v. Presby*, 25 N. H. 302; *Com. v. Blood*, 97 Mass. 538 (1867); *Gray v. Larrimore*, 4 Sawy. 638 (1867); *Coffield v. McClelland*, 16 Wall. 331 (1872).

² *Harvey v. Tyler*, 2 Wall. 332.

RULE 10. — The regularity of the proceedings of courts of general powers is presumed (A), and so of the proceedings of inferior courts, jurisdiction being once shown to exist (B).¹

The maxim *omnia præsumuntur rite esse acta* finds, perhaps, its best application in sustaining the validity of judicial proceedings. They are presumed to be regular.² So

¹ *Merritt v. Baldwin*, 6 Wis. 439 (1858); *Outlaw v. Davis*, 27 Ill. 467 (1861); *Tharp v. Com.*, 3 Metc. (Ky.) 411 (1861); *Com. v. Bolkom*, 3 Pick. 281 (1825); *Davis v. State*, 17 Ala. 334 (1860); *State v. Farish*, 23 Miss. 483 (1852); *McGrews v. McGrews*, 1 St. & P. 30 (1831).

² *Brown v. Connelly*, 21 Ark. 140 (1840); *Seegoe v. Thomas*, 3 Blatchf. 111 (1853); *Sanford v. Sanford*, 28 Conn. 6 (1859); *Sidwell v. Worthington*, 8 Dana, 74 (1839); *Brown v. Gill*, 49 Ga. 549 (1873); *Hudson v. Messick*, 1 Houst. 275 (1835); *Tibbs v. Allen*, 27 Ill. 119 (1862); *Moore v. Neil*, 39 Ill. 256 (1866); *Rosenthal v. Renick*, 44 Id. 202 (1867); *Owen v. State*, 25 Ind. 371 (1865); *Keely v. Garner*, 13 Id. 400 (1859); *Morgan v. State*, 12 Id. 449 (1859); *McNorton v. Akers*, 24 Ia. 369 (1868); *Sumner v. Cook*, 13 Kas. 162 (1873); *Letcher v. Kennedy*, 3 J. J. Marsh. 701 (1830); *Sprague v. Litherberry*, 4 McLean, 442 (1848); *Reynolds v. Nelson*, 41 Miss. 83 (1866); *Apthorp v. North*, 14 Mass. 167 (1817); *Com. v. Balkom*, 3 Pick. 281 (1825); *McGrews v. McGrews*, 1 St. & P. 30 (1831); *Callison v. Antry*, 4 Tex. 371 (1849); *Smith v. Sprague*, 4 Vt. 43 (1867); *Reedy v. Scott*, 23 Wall. 352 (1874); *Florèntine v. Barton*, 2 Id. 210 (1864); *Coffield v. McClelland*, 16 Id. 331 (1872); *Addington v. Allen*, 11 Wend. 374 (1833); *Foot v. Stevens*, 17 Id. 486; *Erwin v. Lowry*, 7 How. 181; *Voorhees v. Bank of United States*, 10 Pet. 449; *King v. Lyme Regis*, 1 Dougl. 159 (1779); *Caunce v. Rigby*, 3 M. & W. 68 (1837); *James v. Heward*, 3 G. & Dav. 264 (1842); *Parsons v. Lloyd*, 3 Wils. 341 (1772); *Jackson v. Astor*, 1 Pinney, 137; 39 Am. Dec. 231 (1841); *Shaefer v. Gates*, 3 B. Mon. 453; 38 Am. Dec. 164 (1842); *Seechrist v. Baskin*, 7 W. & S. 403; 49 Am. Dec. 251 (1844); *Homer v. State Bk.*, *supra*; *Carter v. Jones*, 5 Ired. (Eq.) 196; 49 Am. Dec. 424 (1843); *Parker v. Boston*, etc., R. Co., 3 Cush. 107; 50 Am. Dec. 709 (1849); *Armstrong v. Mudd*, 10 B. Mon. 144; 50 Am. Dec. 545 (1849); *Sever v. Russell*, 4 Cush. 513; 50 Am. Dec. 811 (1849). A mass of decisions in the different courts throughout the country affirm this principle. They are grouped hereunder according to States for convenience of reference: **Alabama** — *Leavitt v. Smith*, 14 Ala. 279 (1848). That charge was justified by the evidence. *Morris v. State*, 25 Ala. 57 (1864). That court below acted properly. *Moore v. Briggs*, 14 Ala. 700 (1848); *Chamberlain v. Darrington*, 4 Port. (Ala.) 515 (1837); *Castleberry v. Pearce*, 2 Stew. & P. 14 (1832). Evidence rejected below will be presumed to have been properly rejected. *Holleman v. DeNyse*, 51 Ala. 95 (1874); *Blair v. Chapman*, 62 Ala. 58 (1878); *Baker v. Prewett*, 64 Ala. 551 (1879). Judgment presumed to be regular (*Falkner v. Christian*, 51 Ala. 495 (1874)) even where the proceedings are summary. *Shouse v. Lawrence*, 51 Ala. 560 (1874). The refusal of a charge by the lower court which is not shown to be in writing as required by statute will be presumed to have been refused because not in writing. *Green v. State*, 66 Ala. 40 (1880). **Arkansas** — *Hale v. Warner*, 36 Ark. 221 (1880); *Jones v. Graham*, 36 Ark. 383 (1880); *Dean v. State*, 37 Ark. 59 (1881); *Founders v. State*, 37 Ark. 339 (1881); *State v. Nichols*, 38 Ark. 550 (1882); *St. Louis*, etc., R. Co. v. *Murphy*, 38 Ark. 456 (1882); *Casteel v. Casteel*, 38 Ark. 477 (1882); *Willson v. Light*, 4 Ark. 153 (1842); *Bizzell v. Williams*, 8 Ark. 138 (1847). That jury was properly sworn below. *State v. Gibson*, 21 Ark. 140 (1860). **California** — *Parker v. Altschul*, 60 Cal. 880 (1892); *Roe v. Superior Court*, 60 Cal. 93 (1882); *Meredith v. Santa Clara Mining Co.*, 60 Cal. 617 (1882); *Parnell v. Haahn*, 61 Cal. 131 (1882); *Onesti v. Freelon*, 61 Cal. 625 (1882); *People v. Fuqua*, 61 Cal. 377 (1882); *Montgomery v. Merrill*, 62 Cal. 386 (1882);

too after verdict a court of review will assume that the necessary facts to sustain it were proved.¹

Hastings v. Cunningham, 35 Cal. 549 (1868); *Moyes v. Griffith*, 35 Cal. 556 (1868); *Garrison v. McGlockley*, 38 Cal. 78 (1869); *Mahoney v. Middleton*, 41 Cal. 41 (1871); *Morris v. Angle*, 43 Cal. 236 (1871); *Wilson v. Dougherty*, 45 Cal. 34 (1872); *Brown v. Kentfield*, 50 Cal. 129 (1875). That person was present when verdict was rendered. *People v. Stuart*, 4 Cal. 218 (1854). That evidence warranted verdict or judgment. *Doll v. Anderson*, 37 Cal. 248 (1865); *Folsom v. Root*, 1 Cal. 374 (1851); *Belt v. Davis*, 1 Cal. 134 (1850); *Kilburn v. Ritchie*, 2 Cal. 145 (1852); *Grewell v. Henderson*, 7 Cal. 290 (1857); *Nelson v. Lemmon*, 10 Cal. 49 (1858); *Hentsch v. Porter*, 10 Cal. 555 (1858); *Brooks v. Douglass*, 33 Cal. 209 (1867); *Sears v. Dixon*, 33 Cal. 326 (1867); *Wallbridge v. Ellsworth*, 44 Cal. 353 (1872). *Colorado*—That grand jury was properly impaneled. *Wilson v. People*, 3 Col. 325 (1877). That verdict was in proper form. *Christ v. People*, 3 Col. 394 (1877). *Florida*—*Reed v. State*, *Story v. State*, 16 Fla. 564 (1878); *Miller v. Kingsbury*, 8 Fla. 356 (1859). *Georgia*—*Tyler Cotton Press Co. v. Chevelier*, 56 Ga. 494 (1876); *Endres v. Lloyd*, 56 Ga. 547 (1876); *Tabb v. Collier*, 68 Ga. 641 (1882); *Shands v. Howell*, 28 Ga. 223 (1859); *Anderson v. State*, 42 Ga. 9 (1871); *Kerwick v. Steelman*, 44 Ga. 197 (1871); *Deupree v. Deupree*, 45 Ga. 414 (1872); *McKee v. McKee*, 43 Ga. 332 (1873); *Morris v. Ogles*, 56 Ga. 592 (1875); *Bryson v. Chisholm*, 56 Ga. 536 (1875); *Laramore v. McKenzie*, 60 Ga. 532 (1875); *Hudgins v. State*, 61 Ga. 182 (1878); *Langston v. Marks*, 68 Ga. 435 (1882); *McMichael v. Hardee*, 68 Ga. 831 (1882). The charge of the court below is not on the record. The presumption is that the court charged the law correctly. *Spears v. State*, 50 Ga. 252 (1874); *Lackey v. Bostwick*, 54 Ga. 45 (1875); *Jordan v. Ingram*, 57 Ga. 92 (1876); *Epping v. Tunstall*, 57 Ga. 267 (1876); *Mobile Fire Ins. Co. v. Miller*, 58 Ga. 420 (1877); *Madden v. State*, 58 Ga. 563 (1877); *Burge v. State*, 62 Ga. 170 (1879); *Hunt v. Pond*, 67 Ga. 578 (1881); *Sims v. State*, 68 Ga. 486 (1882). *Illinois*—*Kern v. Strasberger*, 71 Ill. 303 (1874); *Hermann v. Pardridge*, 79 Ill. 471 (1875); *People v. Gray*, 72 Ill. 343 (1874); *Corbus v. Tweed*, 69 Ill. 205 (1873); *Barnett v. Wolf*, 70 Ill. 76 (1873); *Bush v. Harrison*, 70 Ill. 480 (1873); *Maxcy v. Williamson*, 72 Ill. 206 (1874); *Jones v. Neeloy*, 73 Ill. 449 (1874); *St. Louis, etc., R. Co. v. Wheelis*, 73 Ill. 533 (1874); *Choate v. Hathaway*, 73 Ill. 519 (1874); *Shattuck v. People*, 5 Ill. 478 (1843); *Reed v. Phillips*, 5 Ill. 43 (1842); *Glancy v. Elhott*, 14 Ill. 456 (1853); *Dukes v. Rowley*, 24 Ill. 210 (1860); *Scott v. White*, 71 Ill. 237 (1874); *Harris v. Lester*, 80 Ill. 306 (1875); *Merchants, Dispatch Trans. Co. v. Joesting*, 89 Ill. 152 (1878); *Brennan v. Shinkle*, 89 Ill. 604 (1878); *Carr v. Miner*, 92 Ill. 604 (1879); *Augustine v. Doud*, 1 Ill. (App.) 588 (1878); *Tompkins v. Mann*, 6 Ill. (App.) 171 (1880); *Fuller v. Bates*, 6 Ill. (App.) 442 (1880); *People v. Hessing*, 28 Ill. 410 (1862). That court below disregarded incompetent evidence. *Ritter v. Schenk*, 101 Ill. 387 (1882); *Fisher v. Chicago, etc., R. Co.* 104 Ill. 323 (1882). That bill of exception shows the correct facts. *Eastman v. People*, 93 Ill. 112 (1879). *Indiana*—*Harvey v. Lafin*, 2 Ind. 478 (1851); *Cory v. Silcox*, 6 Ind. 39 (1854); *Houston v. Houston*, 4 Ind. 139 (1853); *Tam v. Shaw*, 10 Ind. 469 (1858); *Holloway v. State*, 53 Ind. 554 (1876); *State v. Steinmeier*, 64 Ind. 87 (1878); *Salander v. Lockwood*, 66 Ind. 285 (1879); *Hood v. Pearson*, 67 Ind. 308 (1879); *Ross v. Misner*, 3 Blackf. 362 (1834); *Beeman v. State*, 5 Blackf. 165 (1839); *State v. Beachmo*, 8 Blackf. 246 (1846); *Nichols v.*

¹ *Dobson v. Campbell*, 1 Sumn. 319 (1833); *Minor v. Mechanics' Bank*, 1 Pet. 46 (1828); *Bastard v. Trutch*, 3 Ad. & Ell. 451 (1835); *R. v. Whiston*, 4 Id. 607 (1836); *R. v. Whitney*, 5 Id. 191 (1836); *R. v. Long Buckley*, 7 East, 45 (1806); *Lee v. Johnstone*, L. R. 1 H. L. Sc. 426 (1869); *Reed v. Jackson*, 1 East, 355 (1801); *Ramsbottom v. Buckhurst*, 2 M. & S. 567 (1813); *R. v. Carlisle*, 2 B. & Ad. 367 (1831); *Jackson v. Pesked*, 1 M. & S. 237; *Spiers v. Parker*, 1 T. R. 141 (1778); *Davis v. Black*, 1 Q. B. 911 (1841); *Harris v. Godwynn*, 2 M. & G. 405; *Gladthorpe v. Hardman*, 13 M. & W. 377 (1844); *Smith v. Keating*, 6 C. B. 136 (1848); *Kidgill v. Moor*, 9 Id. 364 (1850); *Delamere v. Queen*, L. R. 2 H. L. 419 (1867); *R. v. Waters*, 1 Den. C. C. 356; *R. v. Bowen*, 13 Q. B. 790 (1849); *Gibbs v. Pike*, 9 M. & W. 351 (1842).

On the same principle the regularity of the proceedings of a military court,¹ and the correctness of acts of legislative bodies² are presumed.

Woodruff; 8 Blackf. 439 (1847). As that the grand jury was properly impaneled. Long v. State, 46 Ind. 583 (1874). Iowa—County of Mills v. Hamaker, 11 Iowa, 206 (1860); Pursley v. Hays, 17 Iowa, 310 (1864); Caudill v. Tharp, 1 G. Greene, 94 (1848); Baum v. Jones Co., 1 G. Greene, 165 (1848); Rowan v. Lamb, 4 G. Greene, 468 (1854); Henry v. Evans, 68 Iowa, 560 (1889). The record being silent, the Supreme Court will presume that the jury in a criminal trial when they retired to consider their verdict, were in charge of a sworn officer; State v. Pitts, 11 Iowa, 343 (1860); also that they were admonished by the judge as required by law, as to their duty when separating. State v. Shellady, 8 Iowa, 477 (1859). Kansas—Mickel v. Hicks, 19 Kas. 578 (1878); Commrs. of Brown Co. v. Roberts, 22 Kas. 763 (1879); Murray v. Kelley, 23 Kas. 666 (1880). "In the absence of any evidence to the contrary, the presumption would be, that a judgment entered in vacation was valid, according to the laws of Illinois." Dodge v. Coffin, 15 Kas. 280 (1875); Ward v. Baker, 16 Kas. 31 (1876); Haynes v. Cowen, 15 Kas. 277, 637 (1875). Kentucky—Young v. Dorsey, 2 Litt. 203 (1822); Chrisman v. Gregory, 4 B. Mon. 474 (1844). Louisiana—Bank of Alabama v. Livingston, 2 La. Ann. 915 (1847); Gentile v. Foley, 8 La. Ann. 146 (1848). Maine—Bangor v. Brunswick, 30 Me. 598 (1849); Bullen v. Arnold, 31 Me. 583 (1850). Michigan—That court below acted on sufficient evidence Wood v. Lake Shore R. Co., 49 Mich. 370 (1882); and disregarded incompetent evidence, Cuming v. Grand Rapids, 46 Mich. 150 (1881); Keables v. Christie, 47 Mich. 594 (1882); Mawich v. Elsey, 47 Mich. 10 (1881); or otherwise proceeded properly. Maxwell v. Deens, 46 Mich. 35 (1881); Brown v. Haak, 48 Mich. 229 (1882); Facey v. Fuller, 13 Mich. 527 (1865). Jury is presumed to be intelligent enough to understand judge's charge. Hart v. Newton, 48 Mich. 401 (1882). Minnesota—That court below acted properly or on sufficient evidence. Butler v. Winona Mill Co., 28 Minn. 205 (1881); Jones v. Wilder, 28 Minn. 239 (1881); State v. Brown, 12 Minn. 538 (1867). Mississippi—That court below acted properly, or on sufficient evidence. Hightower v. State, 58 Miss. 636 (1881); Guice v. State, 60 Miss. 714 (1882); Taggart v. Muse, 60 Miss. 870 (1882); Smith v. State, 58 Miss. 867 (1881); Dyson v. State, 26 Miss. 362 (1853); Carter v. Blanton, 33 Miss. 291 (1857). Missouri—Appleby v. Brock, 76 Mo. 315 (1882); Belkin v. Rhodes, 76 Mo. 643 (1882); Johnson v. Long, 72 Mo. 210 (1880); State v. Brown, 75 Mo. 317 (1882); Walther v. Warner, 26 Mo. 143 (1858). Nebraska—Hansen v. Bergquist, 9 Neb. 269 (1879); State National Bk. v. Scofield, 9 Neb. 499 (1880); Davenport Plow Co. v. Mewis, 10 Neb. 317 (1880). Nevada—Nosler v. Haynes, 2 Nev. 53 (1866); Champion v. Sessions, 2 Nev. 271 (1866); Mitchell v. Bromberger, 2 Nev. 345 (1866); Virgin v. Brubaker, 4 Nev. 31 (1868); State v. Stanley, 4 Nev. 71 (1868); Lady Bryan Gold, etc., Co. v. Lady Bryan Mining Co., 4 Nev. 414 (1868); Flannery v. Anderson, 4 Nev. 438 (1868); Re Stickworth, 7 Nev. 223 (1872). New Jersey—Coxe v. Field, 13 N. J. (L.) 215 (1832). New York—Barnard v. Heydrick, 49 Barb. 63 (1866). Ohio—Merchant v. North, 10 Ohio St. 251 (1859); Sheehan v. Davis, 17 Ohio St. 571 (1867); Hemmingway v. Davis, 24 Ohio St. 150 (1873). Pennsylvania—Fife v. Com., 29 Pa. St. 429 (1857). Texas—Frosh v. Holmes, 6 Tex. 79 (1852); Hillebrant v. Burton, 17 Tex. 138 (1856); Castanedo v. State, 7 Tex. (App.) 584 (1880); Davis v. State, 6 Tex. (App.) 197 (1879). Virginia—Ayres v. Robins, 30 Gratt. (Va.) 106 (1878). West Virginia—Garrison v. Myers, 12 W. Va. 530 (1878); Paxton v. Rucker, 15 W. Va. 547 (1879). Wisconsin—Abbott v. Johnson, 47 Wis. 239 (1879); Knowlton v. Culver, 1 Chand. (Wis.) 214 (1849). United States—U. S. v. White, 5 Cranch C. C. 73 (1836); Young v. Ridenbaugh, 3 Dill. 23. (1875); Sprague v. Litterberry, 4 McLean, 442 (1848).

¹ Slade v. Minor, 3 Cranch C. C. 139 (1817).

² Gossett v. Howard, 10 Q. B. 441 (1845); Garrett v. Dillsbury R. Co., 78 Pa. St. 467 (1875); Cochran v. Arnold, 58 Id. 399 (1868); Wickham v. Page, 49 Mo. 527 (1872).

Illustrations.

A.

I. The record of a probate court shows the regular appointment of an administrator, and that on a subsequent day it was ordered that "the resignation be" received and recorded, and that letters *de bonis non* were on the same day granted to another. In a collateral proceeding involving the validity of the latter's appointment, it will be presumed that the resignation recorded was of the office of administrator, and that it was in writing as required by statute.¹

II. The record of an action upon a penal bond states that the "jury were sworn as required by law." The presumption is, that they were sworn "to inquire into the truth of the breaches and assess the damages" as to a party in default, and to "try the issues and assess the damages" as to those who have appeared, as the statute requires.²

III. Lands of an infant are sold in pursuance of a decree of a circuit court. On a bill filed to set aside the sale, the record shows that process was ordered against the infants, and at the following term a guardian *ad litem* appointed. The presumption is that they were regularly brought into court.³

IV. A statute requires that on a sale for taxes the purchaser shall give a bond to be approved by the court; otherwise the acknowledgment of the deed will be invalid. In a proceeding to set aside a tax sale it will be presumed that the bond on file was approved by the court.⁴

V. A., in an action of book account, presents to the court certain matters for adjustment and allowance, which were passed upon by a referee and his report is accepted by the court. B. sues A. on two promissory notes to which A. pleads payment. His evidence shows that they were the same matters as have been presented before the court. The presumption is that the referee's decision was made on the merits and was a final settlement.⁵

VI. In the Supreme Court in a criminal case, the record does not show whether the charge of the judge was in writing, as required by law, or oral. The presumption is that it was the former.⁶

VII. B. being convicted of rape, on appeal to the Supreme Court the record shows that the jury were "duly sworn." The law requires that they shall be sworn to "well and duly try and true deliverance make," etc. The presumption is that the proper oath was administered.⁷

¹ Gray v. Cruise, 36 Ala. 559 (1860).

² State v. Gibson, 21 Ark. 140 (1860).

³ Brackenridge v. Dawson, 7 Ind. 383 (1856).

⁴ Cromlein v. Brink, 29 Pa. St. 523 (1853).

⁵ Stearns v. Stearns, 32 Vt. 678 (1860).

⁶ People v. Garcia, 25 Cal. 531 (1864).

⁷ Beale v. Com., 25 Pa. St. 11 (1855).

VIII. In an appellate court the record states a verdict for the plaintiff on twelve counts, and that the jury were discharged on eight others. It is objected that there is nothing to show that the jury have been discharged with the consent of the parties. This will be presumed to have been the case.¹

IX. A court affirms the report of a sale made by a master under a decree of foreclosure. The presumption is that the evidence was sufficient to warrant a confirmation.²

X. An appeal bond is executed by an attorney in fact. The presumption is that the court had evidence of his authority to do so.³

XI. An order of sale does not on its face appear to have been granted on the application of the administrator, as required by law. This in another proceeding will be presumed.⁴

XII. A statute empowers a court to call special terms. A record recites that the court convened in pursuance of the order of the judge heretofore made. The presumption is that the special term was in conformity with the statute.⁵

XIII. One judge tries a case in the place of another. The reason for the change does not appear. The presumption is that it is for a reason mentioned in the statute allowing such changes.⁶

XIV. The record does not show who presided at the trial below. The presumption is that the judge rightly authorized by law did.⁷

XV. It does not appear in a record whether a certain juror was sworn on the trial. The presumption is that he was.⁸

XVI. An objection to a question is sustained by the court, but the witness, nevertheless, proceeds to answer it. The presumption is that the jury disregarded the answer.

XVII. A supreme court has power to appoint school directors when vacancies occur. The record of the court shows it appointed certain school directors, but does not show that vacancies existed at the time. This will be presumed.⁹

XVIII. A record on appeal states that the issue was tried by "a jury of good and lawful men." Only eleven names are set out. The court will presume that there were twelve jurors.¹¹

¹ *Powell v. Sonnett*, 3 Bing. 381 (1826).

² *Moore v. Titman*, 33 Ill. 358 (1864).

³ *Illinois Cent. R. Co. v. Johnson*, 40 Ill. 35 (1864).

⁴ *Lay v. Lawson*, 23 Ala. 377 (1853).

⁵ *Cook v. Skelton*, 20 Ill. 107 (1858).

⁶ *People v. Mellon*, 40 Cal. 648 (1871).

⁷ *People v. Woodside*, 73 Ill. 407 (1874).

⁸ *People v. Darr*, 61 Cal. 533 (1883).

⁹ *People v. Hall*, 57 Cal. 569 (1881).

¹⁰ *Pierce v. Edington*, 38 Ark. 150 (1881).

¹¹ *Foote v. Lawrence*, 1 Stew (Ala.) 483 (1828).

XIX. In the Supreme Court the record does not show that the person was present when the order for his execution was made. It is conceded that he had this right. The presumption is that it was accorded him.¹

XX. Parties appeal from a decree rendered on final hearing "on the original and amended bills, with the exhibits thereto, decrees *pro confesso* against the parties who had not appeared and pleaded, and the agreement of counsel." The agreement is not set out in the record. The court will presume that it justified the decree rendered.²

XXI. The record on appeal in a murder case recites that the jury "were duly sworn according to law." The presumption is that the correct oath was administered.³

The Supreme Court will not presume that the District Court received documents in evidence not properly stamped as required by the United States law.⁴ From delivery of letters of administration it is presumed that oath required of the administrator was taken.⁵ Proof that certain lost writs were issued by the proper officer raises a presumption that they were sufficient as to form and seal.⁶ Where a cause is on trial at twelve o'clock on the night of the last day of the term, it will be assumed that the term did not close until that time.⁷ A modification of judgment made by the court after verdict will be presumed to have been made on the statutory grounds.⁸ It will be presumed that an order directing a sheriff to sell property of a succession was regularly issued.⁹ Where the law requires that the bond given

¹ *People v. Sing Linn*, 61 Cal. 538 (1892). Missouri cases *contra*.

² *Collins v. Loyal*, 56 Ala. 408 (1876); and see *Hearn v. State*, 62 Ala. 218 (1878).

³ *Mitchell v. State*, 58 Ala. 417 (1877). "The sum of our decisions on the question of error in swearing the jury is that the correct oath will be presumed to have been administered when it appears that the jury was sworn, unless it also appears that one substantially different or defective was administered. *Walker v. State*, 49 Ala. 370; *McCaller v. State*, 49 Ala. 40; *Crist v. State*, 21 Ala. 149; *Blair v. State*, 53 Ala. 344; *De Bardelaban v. State*, 50 Ala. 180; *Moore v. State*, 53 Ala. 424; *Bush v. State*, 53 Ala. 13; *McNeill v. State*, 47 Ala. 503; *Edwards v. State*, 49 Ala. 334; *McGuire v. State*, 37 Ala. 161. The cases of *Johnson v. State*, 47 Ala. 31; *Smith v. State*, 47 Ala. 545; *Smith v. State*, 53 Ala. 436, and *Murphey v. State*, 54 Ala. 178, being contrary to the decisions in the cases *supra* are overruled."

⁴ *Towne v. Bossler*, 19 La. Ann. 163 (1867).

⁵ *Brooks v. Walker*, 3 La. Ann. 150 (1848).

⁶ *McNorton v. Akers*, 24 Ia. 369 (1868).

⁷ *Morgan v. State*, 12 Ind. 449 (1859).

⁸ *Sumner v. Cook*, 12 Kas. 163 (1873).

⁹ *Re Wadsworth*, 3 La. Ann. 966 (1874).

by an administrator before the sale of the real estate of his intestate shall be approved in writing by the judge of probate, the presumption is that this was done.¹ So as to duties of the register of court before sale.² It will be presumed that the court below did "strict justice" to the parties as required by statute.³ In a collateral proceeding it will not be presumed that service was made by an officer of the court outside of the county.⁴ A letter of guardianship in due form will be presumed to have been regularly issued.⁵ The presumption is that evidence admitted by a justice of the peace is legal evidence; the party alleging error must prove it.⁶ A docket entry showing that the jury were "sworn according to law," the presumption is that they were regularly sworn.⁷ Where, after an order for a change of venue, the parties appear and litigate the case in the same court to final judgment, the presumption is that the change of venue is waived.⁸ A judgment by default entered on the first day of a term is presumed to be entered while the court is in session and on due proof of the non-appearance of the defendant.⁹ Where a writ is duly returned it will be presumed that it was duly served.¹⁰ The law presumes that proper care is taken of official records and files;¹¹ that copies of papers used in the court below were proper copies.¹² "Upon the common presumptions in favor of every judicial tribunal, acting within its jurisdiction, we must suppose that all persons concerned had due notice."¹³ Where judgment is shown the presumption is that the summons was served

¹ *Austin v. Austin*, 50 Me. 74 (1862).

² *Vincent v. Eaves*, 1 Metc. 247 (1856).

³ *Grinstead v. Foote*, 26 Miss. 476 (1853).

⁴ *State v. Williamson*, 57 Mo. 192 (1874).

⁵ *Vanderveere v. Gaston*, 25 N. J. L. 615 (1856).

⁶ *Smith v. Williamson*, 11 N. J. L. 313 (1860).

⁷ *Williamson v. Fox*, 38 Pa. St. 214 (1861).

⁸ *Frosh v. Holmes*, 8 Tex. 29 (1852); *Doty v. State*, 6 Blackf. 529 (1843).

⁹ *Bunker v. Rand*, 19 Wis. 254 (1865).

¹⁰ *Drake v. Duvenick*, 45 Cal. 455 (1873).

¹¹ *Rice v. Cunningham*, 39 Cal. 492 (1866).

¹² *Morris v. Ogle*, 56 Ga. 592 (1876).

¹³ *Brown v. Wood*, 17 Mass. 68 (1820).

on the defendant as required by law.¹ Where documentary evidence used in the court below has been lost, everything is to be presumed to have been contained in them to support the opinion of the court.² But injury is presumed from evidence erroneously admitted.³

In case IV. it was said: "If any presumption of law be reasonable, it is that which favors the regularity of judicial proceedings until something else appears; and the greater the tendency to irregularity, the greater the necessity for violence of presumption against it. This is all that saves our records. The bond required in this case was given. The court ought to have approved it. Without such action the acknowledgment of the deed was improper; and before convicting the judges of impropriety, some evidence is needed. The absence of any note of approval is insufficient. The letter of the law did not require it, and the omission was an informality which can not upturn the whole proceeding."

In case V. it was said: "To support the plea of payment the plaintiff gave evidence of certain matters which he claimed to have applied as payment, which he had previously presented before the auditor for allowance in his action on book against the defendant, and which were passed upon by the auditor. It appears from the bill of exceptions that the report of the auditor was accepted by the court. The claim of the plaintiff here is that there was no testimony tending to show that the matters he claimed before the auditor were either allowed or rejected upon their merits; and as they might have been disallowed on some mere technical point, the plaintiff should be allowed to have them apply as payment, unless the defendant shows affirmatively that the decision of the auditor was upon their merits. But we think that the *prima facie* presumption of law is to the contrary, viz.: that where a question is brought before

¹ Ray v. Bowley, 4 Thomp. & C. 43; 1 Hun, 614 (1874).

² Carroll v. Peake, 1 Pet. 18 (1828).

³ Grimes v. Fall, 15 Cal. 63 (1860).

a judicial tribunal, having jurisdiction of the matter, and is there decided, the decision is presumed to be upon the merits of the controversy and to be a final settlement of it. The contrary, if claimed, must be made to appear by due proof. Public policy requires this presumption, that there may be an end to litigation; and experience shows that in the ordinary administration of justice the fact corresponds with the legal presumption."

In case VII. it was said: "Because the law enjoined an oath in the form I have stated, and because the record says the jury were sworn, we are bound to presume that they were sworn in that form. * * * We are brought by an inspection of the record and the application of the appropriate legal maxim to the conclusion that the oath actually administered was the very oath the law furnished for the occasion. We are not to expect too much from records of judicial proceedings. They are memorials of the judgments and decrees of the judges, and contain a general, but not a particular, detail of all that occurs before them. If we should insist upon finding every fact fully recorded which must occur before a citizen must be punished for an offense against the laws, we should destroy public justice and give unbridled license to crime. Much must be left to intendment and presumption, for it is often less difficult to do things correctly than to describe them correctly. This record is unusually full; its fullness, indeed, is the source of the defections urged against it; and yet it does not tell us how the defendant was tried, whether in the course of common-law trials by jury, or in some of the various other modes that have been known in the world. Is the judgment to be reversed for that reason? By no means. We intend that the trial was by jury and by witnesses confronting the deceased, because the record certifies us of a trial, and we know that a jury and witnesses are indispensable to a constitutional and legal trial. In the same manner we infer the presence of the jury throughout the trial, though the record takes no notice of them from the 24th to the 27th of Octo-

ber; and that the testimony was delivered *ore tenus*, though the names of the witnesses in the margin is all that is said about witnesses."

In case XIX. it was said: "It is claimed on the part of the defendant that he was entitled to be present when the order for his execution was made. So he was. But it does not appear from the record that he was not present, and in support of the regularity of the proceedings of the court below, the presumption is indulged that he was."

In case XX. it was said: "Shall the presumption be made, if error is found in the record as it now stands, that it was not cured and the decree authorized by the agreement? Or shall the presumption be indulged that the court conformed the decree to the agreement submitted to it, by which the errors apparent on the record were waived? It is the last presumption which the unvarying practice of this court compels us to indulge. Error must be shown affirmatively, and all reasonable intendments consistent with the record must be made in support of the decrees or judgments of primary courts."

B.

I. A judgment is produced which was confessed before a justice of the peace. The law required that the confession should be entered on the minutes of a docket and the judgment made thereon. The docket is lost. The presumption is that the entry was properly made.¹

II. It appearing that a probate court had jurisdiction to render a certain judgment, the question arises, whether all the proceedings were regular. The presumption is that they were.²

III. On an application to a surrogate for an order to sell the real estate of a decedent, the court appointed a guardian for the infant heirs. The question subsequently arose whether this had been done within the time required by statute. The presumption was that it had.³

IV. The terms of a police court were by law daily for the transaction of criminal business and on certain specified days for civil business. The record of a criminal case in such court showed only that the trial

¹ *Slicer v. Bank of Pittsburgh*, 16 How. 571 (1853).

² *State v. Hinchman*, 27 Pa. St. 479 (1856).

³ *Sheldon v. Wright*, 7 Barb. 39 (1849).

took place on a day named. The presumption was that the court was then engaged in the transaction of criminal business.¹

In case II. it was said : “ From all this it appears, first, that the Probate Court had jurisdiction to render the judgment sued on. The costs accrued in a proceeding in a civil case. And this appearing upon an inquiry which we are bound to institute, it matters not that the probate court ranks as an inferior tribunal, and not as one of those superior courts who exercise a common-law jurisdiction, and whose acts and judgments are conclusive in themselves; for the strictness with which the proceedings of inferior tribunals are scrutinized only applies to the question of jurisdiction, and when the existence of that is proved and conceded, the maxim *omnia rite acta* applies to them as well as to courts of general jurisdiction.”

“ Upon the whole,” said Wells, J., in case III., “ I am prepared to hold at this point in the case, that the ordinary presumption that a public officer has done his duty should apply. I do not think that such a presumption alone should ever be allowed to sustain a vital jurisdictional fact, such as I regard this to be ; but, inasmuch as the fact that a guardian was appointed is made out independently, and without the aid of such presumption, as the question is only as to the time when it was done, and as the proof shows that it might have been done in proper time, the law will presume that the appointment was made the requisite time before the parties in interest were by the order to show cause.”

In case IV. it was said : “ A court was required by law to be held on that day for criminal business. It is to be presumed that such a court was held in obedience to the requirement ; and as this case was within the jurisdiction of such a court, and as the record recites that it was heard and adjudged in the police court of Haverhill on that day, it is to be presumed that it was then engaged in the transaction of criminal business. It was tried at a time when the court should have been, and, we presume, was in session for that purpose.”

¹ Com. v. Brown, 123 Mass. 410 (1877).

RULE 11. — Jurisdiction of the person beyond the territorial limits of a court of general powers can not be presumed.

“The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process. * * * The tribunals of one State have no jurisdiction over the persons of other States, unless found within their territorial limits; they can not extend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy.¹ * * * Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant against whom a personal decree of judgment is rendered, was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree.”²

¹ In *Picquet v. Swan*, 5 Mason, 40, Mr. Justice Story said: “The courts of a State, however general may be their jurisdiction, are necessarily confined to the territorial limits of the State. Their process can not be executed beyond those limits; and any attempt to act upon persons or things beyond them would be deemed a usurpation of foreign sovereignty not justified or acknowledged by the law of nations. Even the Court of King’s Bench in England, though a court of general jurisdiction, never imagined that it could serve process in Scotland, Ireland, or the colonies, to compel an appearance or justify a judgment against persons residing therein at the commencement of the suit. This results from the general principle that a court created within and for a particular territory is bounded in the exercise of its powers by the limits of such territory. It matters not whether it be a kingdom, a State, a county, or a city or other local district. If it be the former it is necessarily bounded and limited by the sovereignty of the government itself, which can not be extra-territorial; if the latter, then the judicial interpretation is that the sovereign has chosen to assign this special limit, short of his general authority.”

² *Galpin v. Page*, 18 Wall. 364 (1873).

RULE 12 .—And a presumption can not contradict facts averred or proved.

“ They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the facts or that the fact was otherwise than as averred. If for example, it appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appears in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so, it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be, that notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed.”¹

¹ Galpin v. Page, 18 Wall. 364 (1873).

CHAPTER III.

THE REGULARITY OF OFFICIAL ACTS.

RULE 13.—The presumption is that one who is proved to have acted in an official capacity possessed the necessary and proper authority.¹

This presumption is a necessary one to shield the acts of an officer *de facto* until the courts have decided the question — if it should come before them — as to his right and title to the office. Thus, in a Kansas case, the commissioners

¹ The application of this rule is found in very many cases, involving different powers and duties — as that he was regularly appointed (*Eaton v. White*, 18 Wis. 518 (1864); or elected as required by law. *Hathaway v. Addison*, 48 Me. 440 (1860). See *Cooper v. Moore*, 44 Miss. 336 (1870); *Butler v. Ford*, 1 Cr. & M. 663 (1833). In re *Murphy*, 8 C. & P. 810 (1837), Coleridge, J., said: "With regard to the last objection these trustees are public officers. They all acted as such before the signing of this rate, and I can not say that there is no evidence that they are trustees. If the proof of their once acting is not enough, would proof of ten times be so? Where is the line to be drawn? I think it is evidence to go to the jury that they were trustees." *James v. Brown*, 5 B. & Ald. 243 (1821); *R. v. Jones*, 2 Camp. 131 (1809); *Mechanics', etc., Bk. v. Union Bk.*, 22 Wall. 276 (1874). "The rule that secondary evidence shall not be admitted where primary evidence is attainable, although a sound general rule, has been relaxed in some cases where general convenience has required the relaxation. The character of a public officer is one of those cases. That he has acted notoriously as a public officer has been deemed *prima facie* evidence of his character, without producing his commission or appointment." *Jacob v. United States*, 1 Brock. 528 (1821). "We do not inquire whether the marshal had fully proved that he had conformed to all the directions of the law; that was required before he entered on the duties of his office; for having shown his commission and also his recognition as marshal by the Federal courts, we presume that he has in other respects conformed to the law, so far as conformity is essential to the offering of his commission." *Kilpatrick v. Frost*, 2 Grant's Cas. 196 (1858); *Jay v. Carthage*, 48 Me. 353 (1860); *Hamlin v. Dungman*, 5 Lans. 61 (1871); *Briggs v. Taylor*, 35 Vt. 57 (1862); *Fay v. Richmond*, 43 Id. 25 (1870); *Wilcox v. Smith*, 5 Wend. 231 (1830); *Salter v. Applegate*, 23 N. J. (L.) 115 (1851); *Druse v. Wheeler*, 23 Mich. 439 (1871); *Shelbyville Trustees v. Town of Shelbyville*, 1 Metc. (Ky.) 54 (1853); *Landry v. Martin*, 15 La. 1 (1840); *Ex parte Strang*, 21 Ohio St. 610 (1871); *Brown v. Connelly*, 5 Blackf. 290 (1840); *Com. v. Fowler*, 10 Mass. 290 (1813); *State v. Perkins*, 24 N. J. (L.) 409 (1854); *Nelson v. People*, 23 N. Y. 293 (1861); *State v. Hill*, 2 Speers, 150 (1843); *People v. Cook*, 8 N. Y. 67 (1853); *Swails v. State*, 4 Ind. 517 (1853); *Woolsey v. Village of Rondout*, 4 Abb. App. Dec. 639 (1866); *Delphi School District v. Murray*, 53 Cal. 29 (1878); *Goldner v. Bressler*, 105 Ill. 420 (1883).

of a certain county paid to the county clerk *de facto* the salary of the office. The title to the office was then in litigation and the courts subsequently decided that another person was the rightful incumbent. After taking possession the latter brought suit against the commissioners for the salary paid to the wrongful incumbent. But the court held that the action did not lie, the payment to the officer *de facto* having been proper,¹ and said: "Now as W. was an officer *de facto*, holding under color of title, every person had a right to recognize him, as a legal and valid officer and to treat him as such. The public, the county, the county commissioners and private individuals had a right to do business with him as an officer, and to pay him for his services, if they chose, without taking any risk of having to pay for such services a second time. It may be greatly to the interest of the public or of the individuals doing business with such officer to pay him when his fees or salary become due, and should they not be allowed to consult the interest of the public and their own interest to so pay him? It is not their fault that he is wrongfully in possession of the office and how are they to know whether he is in possession of the office rightfully or wrongfully? Are they bound to know who is entitled to the office in advance of any final adjudication of the question by the courts? Are they bound to anticipate the decision of the courts? And are they bound to decide the question for themselves as it thus comes up incidentally and collaterally in the payment of fees or salary? And if they should determine that the courts would eventually decide against the officer *de facto*, must they refrain from paying him any fees or salary at perhaps a great loss to themselves? In a Michigan case, Cooley, C. J., said: 'The public who have an interest in the continuous discharge of official duty and whose necessities can not wait the slow process of a litigation to try the title, have a right to treat as valid the official acts of the incumbent, with whom

¹ Commissioners of Saline Co. v. Anderson, 20 Kas. 296; 27 Am. Rep. 171 (1878).

alone under the circumstances they can transact business. This rule is an *obvious* and necessary one for the protection of organized society for, as was said in *Weeks v. Ellis*,¹ the affairs of society can not be carried on unless confidence were reposed in the official acts of persons *de facto* in office.² And private individuals in controversies between themselves are not permitted to question the acts of an officer *de facto*, for the further reason that to do so would be to raise and determine the title to his office in a controversy to which he was not a party and in which he could not be heard.”

Illustrations.

I. In an action brought against A., as a lieutenant in the army of the United States, it is proved that he has acted in that capacity. His appointment and qualification to that office will be presumed.³

II. In an action of slander in his calling by B. against W., B. proves that he has been employed as an attorney in several suits out of which the cause of action arose. It is insisted that he can prove that he is an attorney only by a copy of the roll of attorneys. But from proof of his acting as such the presumption arises that he has been duly enrolled.⁴

III. An action is brought by a vestry clerk of a parish, to which the defendant pleads that the plaintiff is not a vestry clerk as alleged. Evidence of his having acted as vestry clerk is held *prima facie* evidence that he has been appointed.⁵

IV. In an action of assault on H., while he was driving certain cattle of M. to the pound, H. testifies that he has acted as pound-keeper to the town for a number of years. The presumption is that he has been duly appointed.⁶

V. It is required to justify an act that the defendant has authority, as collector of taxes. Proof that he acted as collector of taxes at the time raises the presumption that he is such officer.⁷

¹ 3 Barb. 325.

² *Bendit v. Auditors of Wayne Co.*, 20 Mich. 178.

³ *Hutchins v. Van Bokkelen*, 84 Me. 126 (1852).

⁴ *Berryman v. Wise*, 4 Term Rep. 386 (1791); *Pearce v. Whale*, 5 B. & C. 33 (1826).

⁵ *McGahey v. Alston*, 2 M. & W. 206 (1836).

⁶ *Com. v. McCue*, 16 Gray, 226 (1860); *Briggs v. Taylor*, 35 Vt. 57 (1862); *Druse v. Wheeler*, 22 Mich. 439 (1871).

⁷ *State v. Roberts*, 52 N. H. 492 (1872); *Ronkendorff v. Taylor*, 4 Pet. 349 (1830); *Tucker v. Aiken*, 7 N. H. 113 (1854); *Faulkner v. Johnson*, 11 M. & W. 581 (1843).

VI. In an action of ejectment the question arises whether certain persons are church wardens at a certain time. It being proved that they acted as such at that time, the presumption arises that they hold the offices.¹

VII. A statute empowers a master in chancery "acting under appointment by the lord chancellor to be given for that purpose" to issue a fiat in bankruptcy. A fiat purporting to be issued by a master by virtue of such authority is proved to have been issued. The master has often issued similar fatts. The presumption is that he has the necessary authority.

VIII. A statute provides that a person receiving enlisting money from an officer or attested soldier shall be deemed to have enlisted as a soldier. A. receives enlisting money from B., who is proved to be a soldier. The presumption is that B. is an "attested soldier" within the statute.²

IX. On an indictment for perjury before a surrogate in the ecclesiastical courts it appears that the oath has been administered by one Dr. P., who, it is proved, has acted as surrogate. This is *prima facie* evidence of his having been duly appointed and having authority to administer the oath.³

X. R. is indicted for embezzling a letter, he being an officer of the post-office. Proof that R. acted as an officer of the post-office is *prima facie* sufficient.⁴

XI. A municipal corporation is sued for services for which the trustees had issued a certificate of indebtedness. The certificate is produced, signed by the parties as trustees. The presumption is that they were such officers.⁵

XII. An affidavit to a bill for injunction in Maryland is made before a notary of the District of Columbia. The presumption is that he has power to take the affidavit.⁶

XIII. A. appears in court, or commences an action as attorney for B. The presumption is that A. had authority from B.⁷

In case I. it was said that the evidence introduced (*viz.*, that A. had performed certain acts as lieutenant), must be deemed

¹ Bowley v. Barnes, 8 Q. B. 1037 (1846).

² Marshall v. Toms, 5 Q. B. 115 (1843).

³ Walton v. Gavin, 16 Q. B. 43 (1850).

⁴ Rex v. Verelst, 3 Camp. 432 (1813). So held of a commissioner for taking affidavits in R. v. Howard, 1 Moo. & Rob. 187 (1832).

⁵ R. v. Rees, 6 C. & P. 606 (1834).

⁶ Woolsey v. Village of Rondout, 4 Abb. App. Dec. 639 (1886).

⁷ Conolly v. Riley, 25 Md. 403 (1866).

⁸ Osborn v. U. S. Bank, 9 Wheat. 738; McAlexander v. Wright, 3 T. B. Mon. 189; Bridgeton v. Bennett, 23 Me. 420; Penobscot Boon Co. v. Lamson, 16 Me. 224; Field v. Proprietors, 1 Cush. 11; Gaul v. Grout, 1 Cow. 113; Rogers v. Park, 4 Humph. 480; Reynolds v. Fleming, 30 Kas. 106 (1883); Leslie v. Fisher, 62 Ill. 118; Tally v. Reynolds, 1 Ark. 99; Anderson v. Sutton, 2 Duv. 480 (1866).

sufficient to show that he was a lieutenant *de facto* and that he was duly qualified by taking the oath required by law, "such appointment and qualification are presumed from the acts done, and this presumption will remain until it is removed by other evidence."

In case II., Buller, J., said that "in the case of all peace officers, justices of the peace, constables, etc., it was sufficient to show that they acted in these characters, without producing their appointments, and that even in the case of murder. The excise and custom-house officers indeed fall under a different consideration, but even in those cases evidence was admitted both in criminal and civil suits to show that the party was a reputed officer prior to 11 Geo. 3, chap. 30. In actions brought by attorneys for their fees, the proof now insisted on has never been required. Neither in actions for tithes is it necessary for the incumbent to prove presentation, institution, and induction; proof that he received the tithes and acted as the incumbent is sufficient."

"The plaintiff," said Baron Parke, in case III., "is a public parochial officer; and the rule is that all public officers who are proved to have acted as such, are presumed to have been duly appointed to the office until the contrary is shown."

In case VI. Patteson, J., said: "It is a recognized principle that a person acting in the capacity of a public officer is *prima facie* taken to be so. The fact does not of itself prove any title, but only that the person fills the office."

"The same rule of evidence," said Patteson, J., in case VII., "runs through all offices, from that of a judge to that of a vestry clerk."

In case IX. Lord Ellenborough said: "I think the fact of Dr. P. having acted as surrogate is sufficient *prima facie* evidence that he was duly appointed, and had competent authority to administer the oath. I can not for this purpose make any distinction between the ecclesiastical courts and other jurisdictions. It is a general presumption of law

that a person acting in public capacity is duly authorized so to do."

In case **XII.** it was said: "The oath that the several matters and things stated in the bill are true was administered and duly authenticated by a notary public in the District of Columbia, and it is objected to for the reason that this officer does not appear to have been authorized by law to administer oaths in such cases. This objection is altogether technical and foreign to the substantial equities disclosed by the bill, and of course must be disposed of by the established rule applicable to such a state of case. All that the court could require was that the statements of the bill should be verified by an oath of one or both of the appellees, administered by any person legally competent to perform that office, and had the oath been administered by any notary of this State its sufficiency could not have been questioned, as that class of officers are expressly authorized by our laws to administer such oaths. But here the oath was taken before a notary of the district, in respect to whose legal competency nothing appears on either side. The administration of the oath and authentication of it by his notarial seal, are, however, facts from which we should naturally presume that these acts were done in the regular exercise of powers conferred by the laws of the district."

In case **XIII.** it was said by Chief Justice Marshall: "Certain gentlemen, first licensed by the government, are admitted by order of court, to stand at the bar with a general capacity to represent all suitors. The appearance of any one of these gentlemen in a cause has always been received as evidence of his authority, and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our courts, and no departure from it has been made in those of any State or of the Union." In *Manchester Bank v. Fellows*,¹ the court say: "Formerly attor-

¹ 23 N. H. 304.

neys were required to be appointed by warrant and to file their powers in court, but that practice has long since been disused, and a mere parol retainer is sufficient. And where an action is commenced by a regular responsible attorney, the presumption is that it was done by due authority of the plaintiff. It is not necessary to show authority whether a suit be by an individual or a corporation, in order to the purposes of the suit, unless it is called for by the defendant." So, in *Hardin v. Ho-Yo-Po-Nubby*,¹ it is said: "An attorney is an officer of the court and responsible to the court for the propriety of his professional conduct and the proper use of the privileges he has as such. No warrant of attorney is required by our laws or practice to enable him to appear for and to represent a party in court. He is permitted by almost universal practice in this country to do so under verbal retainer, and it is only in cases of clear want of authority or abuse of his privileges that he is held to be incompetent to institute a suit or to represent a party in court. The presumption is in favor of his authority."

RULE 14.—The presumption is that public officers do as the law and their duty requires them.²

Illustrations.

I. The action is against a carrier for two cases of cutlasses received, to be transported from England to a foreign country. The defense is

¹ 27 Miss. 567.

² *McDonald v. Nelson*, 2 Cow. 139; 14 Am. Dec. 43 (1823); *Farr v. Sims*, Rich. Eq. Cases, 122; 24 Am. Dec. 396 (1832); *Terry v. Bleight*, 3 T. B. Mon. 270; 16 Am. Dec. 101 (1826). **Alabama**—*Holleman v. De Myse*, 51 Ala. 95 (1874); *State Auditor v. Jackson County*, 65 Ala. 142 (1880); *Perry County v. E. Co.*, *Id.* 391 (1880); *Dudley v. Chilton Co.*, 66 Ala. 594 (1880); *Harvey v. Thorpe*, 28 Ala. 251 (1856); *Brandon v. Snows*, 2 Stew. (Ala.) 235 (1830). **Arkansas**—*Budd v. Bettison*, 21 Ark. 583 (1860). **California**—*Den v. Den*, 6 Cal. 81 (1856); *Egery v. Buchanan*, 5 Cal. 53 (1856); *Palmer v. Balling*, 8 Cal. 335 (1857); *Curtis v. Herrick*, 14 Cal. 117 (1859); *Hart v. Burnett*, 15 Cal. 530 (1860); *Guy v. Washburn*, 23 Cal. 111 (1863); *Hagar v. Supervisors*, 47 Cal. 223 (1871); *Baldwin v. Bordheimer*, 48 Cal. 433 (1874); *Weaver v. Fairchild*, 50 Cal. 360 (1875); *People v. Smith*, 59 Cal. 365 (1881); *Upham v. Hoskins*, 63 Cal. 250 (1883). But see *Keane v. Cannovan*, 21 Cal. 291 (1863). **Connecticut**—*Booth v. Booth*, 7 Conn. 350 (1829); *West School Dist. v. Merrills*, 12 Conn. 437 (1838); *Cone v. City of*

made that cutlasses are prohibited from being exported without a license. It being proved that they were entered at the custom-house, the license is presumed.¹

II. It is the duty of an officer to make certain entries in books. The books with such entries signed with his name are produced. The presumption is that he made them.²

Hartford, 23 Conn. 363 (1859). **Florida**—Dupuis v. Thompson, 16 Fla. 70 (1877). **Georgia**—Jefferson v. Mayor, 7 Ga. 181 (1849); Craig v. Adair, 22 Ga. 573 (1857); Pausch v. Guerrard, 67 Ga. 319 (1881); Roberts v. Cook, 68 Ga. 325 (1882); Healey v. Dean, 68 Ga. 514 (1882). **Illinois**—Conwell v. Watkins, 71 Ill. 489 (1874); Gilbraith v. Littlech, 73 Ill. 209 (1874); Garden City Ins. Co. v. Stayart, 79 Ill. 259 (1875); Ballance v. Underhill, 4 Ill. 453 (1842); Glancy v. Elliott, 14 Ill. 456 (1853); Buckmaster v. Job, 15 Ill. 329 (1853); Dunlop v. Daugherty, 20 Ill. 397 (1858); Dyer v. Flint, 21 Ill. 80 (1859); Rives v. Kumler, 27 Ill. 291 (1862); Todemier v. Aspinwall, 43 Ill. 401 (1867); Rosenthal v. Benick, 44 Ill. 202 (1867). **Indiana**—Smith v. Stewart, 5 Ind. 220 (1834); State v. Carter, 6 Ind. 87 (1854); Oulbertson v. Milhollin, 23 Ind. 362 (1864); Feaster v. Woodfill, 23 Ind. 493 (1864); Jenkins v. Parkhill, 25 Ind. 473 (1865); City of Logansport v. Wright, 25 Ind. 512 (1865); Miller v. Hays, 26 Ind. 380 (1866); Jackson School Tp. v. Hadley, 59 Ind. 534 (1877); Ward v. State, 48 Ind. 290 (1874). **Iowa**—Cobb v. Newcomb, 7 Iowa, 43 (1858); State v. Cress, 10 Iowa, 101 (1859); Dollarhide v. Muscatine Co., 1 G. Greene. 158 (1848); Rowan v. Lamb, 4 G. Greene, 468 (1854). **Kentucky**—Ellis v. Carr, 1 Bush, 527 (1866); Phelps v. Ratcliffe, 3 Bush, 334 (1867); Wardell v. Brand, 13 Bush, 77 (1877); Buckner v. Bush, 1 Duv. 394 (1864); Hickman v. Boffman, Hardin, 349 (1866); Webber v. Webber, 1 Met. (Ky.) 18 (1859); Case v. Colston, 1 Met. (Ky.) 145 (1858); Vincent v. Eaves, 1 Met. (Ky.) 248 (1858). **Louisiana**—Dunlap v. Sims, 2 La. Ann. 237 (1847); Hewitt v. Stephens, 5 La. Ann. 640 (1860); Re Lauve, 6 La. Ann. 530 (1861); City of New Orleans v. Gottschalk, 11 La. Ann. 69 (1856); Waddell v. Judson, 12 La. Ann. 14 (1857); Nichols v. McCall, 13 La. Ann. 215 (1858); Webber v. Gottschalk, 15 La. Ann. 376 (1860); Templeton v. Morgan, 16 La. Ann. 438 (1862); City of New Orleans v. Halpin, 17 La. Ann. 185 (1865); Ledoux v. Jamieson, 18 La. Ann. 130 (1866); O'Hara v. Blood, 27 La. Ann. 57 (1875); Tunstall v. Parish of Madison, 30 La. Ann. 471 (1878); Rayne v. Terrell, 33 La. Ann. 812 (1881). **Massachusetts**—Pratt v. Lamson, 6 Allen, 257 (1863); Blanchard v. Young, 11 Cush. 341 (1853); Bruce v. Holden, 31 Pick. 187 (1839); Jones v. Aldermen, 104 Mass. 461 (1870); Gay v. Southworth, 113 Mass. 333 (1873); Clapp v. Thomas, 5 Allen, 158. **Maine**—Shorey v. Hussey, 32 Me. 579 (1861); Jones v. Fletcher, 41 Me. 254 (1856); Randall v. Bowden, 48 Me. 37 (1860). But in County of Hancock v. Eastern River Co., 20 Me. 72 (1841), it was said: "Where two are required to act, except in certain cases, the law does not presume that the case contemplated exists, but the contrary." **Maryland**—Wellersburg, etc., Co. v. Bruce, 6 Md. 457 (1854). **Michigan**—Hourtienne v. Schnoor, 83 Mich. 374 (1876); Supervisors of Houghton Co. v. Rees, 34 Mich. 481 (1876); Perkins v. Nugent, 45 Mich. 156 (1881); Cooper v. Granberry, 83 Mich. 117 (1857); Jakway v. Lenison, 46 Mich. 521 (1881); First Nat. Bk. v. St. Joseph, 46 Mich. 527 (1881). **Minnesota**—Goener v. Woll, 26 Minn. 154 (1879). **Mississippi**—Wray v. Doe, 10 S. & M. 452 (1848); Dyson v. State, 26 Miss. 362 (1853); Nebbett v. Cunningham, 27 Miss. 292 (1854); Harris v. McKissack, 34 Miss. 170 (1857); Wright v. State, 50 Miss. 332 (1874); Waddell v. Magee, 53 Miss. 687 (1876). **Missouri**—McNair v. Hunt, 5 Mo. 300 (1833); Trotter v. St. Louis Public Schools, 9 Mo. 69 (1845); Nolley v. Callaway County Court, 11 Mo. 447 (1848); Grayson v. Weddle, 63 Mo. 523 (1876); Henry v. Dulle, 74 Mo. 443 (1881). **Nebraska**—Tecumseh Town Site Case, 3 Neb. 284 (1874). **New Hampshire**—Wheelock v. Hall, 3 N. H. 210 (1835); Sias v. Badger, 6 N. H. 393 (1838); Wells v. Burbank, 17 N. H. 393 (1845);

¹ Van Omeron v. Doweck, 2 Camp. 44 (1809).

² Taylor v. Cook, 8 Price, 653 (1820).

III. The charter of a municipal corporation requires unanimity in the mayor and council in passing an ordinance. An ordinance is alleged to have been "duly made by the mayor and council." The presumption is that it was made by a unanimous vote.¹

IV. A statute requires the selectmen of a town to be elected by ballot. The record does not show how they were elected. The presumption is that they were elected by ballot.²

Thornton v. Campton, 18 N. H. 27 (1845); *State v. Alstead*, 18 N. H. 59 (1846); *Kimball v. Lamprey*, 19 N. H. 215 (1848); *Scammon v. Scammon*, 28 N. H. 419 (1854); *Gordon v. Norris*, 29 N. H. 196 (1854). **New York**—*Supervisors of Livingston v. White*, 30 Barb. 72 (1859); *Atty.-Gen. v. Reformed Protestant Dutch Church*, 33 Barb. 303 (1861); *People v. Phoenix Bk.*, 4 Bosw. 364 (1859); *Arent v. Squire*, 1 Daly, 347 (1863); *Wood v. Terry*, 4 Lans. 80 (1871); *Rector, etc., of Trinity Church v. Higgins*, 4 Robt. 1 (1866); *Brewster v. Striker*, 2 N. Y. 19 (1846); *Leland v. Cameron*, 31 N. Y. 115 (1865); *People v. Snyder*, 41 N. Y. 397 (1869); *Smith v. Hill*, 23 Barb. 656 (1856). **North Carolina**—*State v. Lamon*, 3 Hawks, 175 (1824); *Rawls v. Deans*, 4 Hawks, 299 (1826). **Ohio**—*Ward v. Barrows*, 3 Ohio St. 241 (1853). **Oregon**—*Denison v. Story*, 1 Oregon, 273 (1859); *Dolph v. Barney*, 5 Oregon, 191 (1874). **Pennsylvania**—*Cuttle v. Brockway*, 24 Pa. St. 145 (1854); *City of Alleghany v. Nelson*, 23 Pa. St. 323 (1855); *Lytle v. Colts*, 27 Pa. St. 193 (1856); *Huzzard v. Trego*, 35 Pa. St. 9 (1859); *Kelly v. Green*, 53 Pa. St. 303 (1866); *Lackawanna Iron Co. v. Fales*, 55 Pa. St. 90 (1867); *Pittsburg v. Walter*, 69 Pa. St. 365 (1871); *Leedom v. Lombaert*, 80 Pa. St. 381 (1876). **South Carolina**—*Ex parte Hanks*, 1 Cheves (S. C.), 203 (1840); *Boulware v. Witherspoon*, 7 Rich. (Eq.) 450 (1855); *Douglas v. Owens*, 5 Rich. (L.) 534 (1852); *State v. Hatcher*, 11 Rich. (L.) 525 (1858); *State v. Harden*, 11 S. C. 360 (1878); *Alston v. Alston*, 4 S. C. 116 (1873). **Tennessee**—*Woods v. State*, 6 Baxt. 426 (1873); *Davis v. State*, 6 Baxt. 429 (1873); *Webb v. Fritz*, 8 Baxt. 218 (1874); *Chapman v. Howard*, 3 Lea, 363 (1879). **Texas**—*Houston v. Perry*, 3 Tex. 390 (1848); *Linn v. Montross*, 5 Tex. 511 (1851); *Edwards v. James*, 7 Tex. (App.) 373 (1851); *Porter v. Parker*, 8 Tex. 23 (1853); *Saunders v. Gilmer*, 8 Tex. 295 (1852); *Lee v. Wharton*, 11 Tex. 61 (1853); *Reid v. Reid*, 11 Tex. 586 (1854); *Sadler v. Anderson*, 17 Tex. 248 (1856); *Baker v. Coe*, 20 Tex. 429 (1857); *Jones v. Mulsbach*, 26 Tex. 235 (1862); *Willis v. Lewis*, 28 Tex. 185 (1866); *Farrar v. State*, 5 Tex. (App.) 489 (1879); *Prior v. State*, *Id.* **Vermont**—*Drake v. Mooney*, 31 Vt. 617 (1859); *Stannard v. Smith*, 40 Vt. 513 (1868). **Virginia**—*Com. v. Garth*, 3 Call, 6 (1801); *Davis v. Johnson*, 3 Muni. 81 (1811); *Paine v. Tutwiler*, 27 Gratt. 440 (1878). **Wisconsin**—*Gillett v. Gillett*, 9 Wis. 194 (1850); *Standish v. Flowers*, 16 Wis. 110 (1863); *Williams v. Troop*, 17 Wis. 463 (1863); *Mills v. Johnson*, 17 Wis. 598 (1863); *Edson v. Hayden*, 18 Wis. 627 (1864); *McCutchin v. Platt*, 22 Wis. 561 (1868); *Lyon v. Green Bay, etc., R. Co.*, 42 Wis. 538 (1877). **United States**—*Russell v. Beebe*, Hempst. 704 (1855); *Johnson v. U. S.*, 14 Ct. of Cl. 276 (1878); *Dunlop v. Munroe*, 1 Oranch C. C. 537 (1809); *U. S. v. Carberry*, 2 Oranch C. C. 358 (1822); *Winter v. Simonton*, 3 Oranch C. C. 104 (1827); *Den v. Hill*, McAll. 430 (1859); *Ruggles v. Bucknor*, 1 Paine, 358 (1824); *The Eureka Case*, 4 Sawy. 302 (1877); *U. S. v. Earhart*, 4 Sawy. 245 (1877); *Wilkes v. Dinaman*, 7 How. 89 (1849); *Minter v. Crommelin*, 18 How. 87 (1855); *Delassus v. U. S.* 9 Pet. 118 (1835); *Strother v. Lucas*, 12 Pet. 410 (1838).

¹ *City of Louisville v. Hyatt*, 2 B. Mon. 130 (1841).

² *Mussey v. White*, 3 Me. 200 (1825). That the acts of the officers of a municipal corporation are presumed to be regular, see *Bassett v. Porter*, 10 Cush. 418 (1852); *Spurr v. Bartholomew*, 3 Metc. 479 (1841). As that a proprietary meeting was convened as required by law, *Society v. Young*, 2 N. H. 310 (1820); *Copp v. Lamb*, 12 Me. 312 (1835); *Inhabitants v. Root*, 18 Pick. 318 (1836); *Cobleigh v. Young*, 15 N. H. 493 (1844). And compare *Clark v. Wardwell*, 55 Me. 61 (1867).

V. A petition in bankruptcy is verified by an affidavit sworn to before the clerk of a United States court. Such clerks are not authorized to take affidavits out of court. The presumption is that the affidavit was made in court.¹

VI. To entitle deeds to be read in evidence, they are required to be acknowledged and recorded in a certain manner. A deed is produced purporting to have been acknowledged before a justice of the peace. The presumption is that the registrar of deeds who made the record had sufficient evidence of the official character of the magistrate to entitle the deed to be recorded.²

VII. It is proved that a sheriff sold certain land and executed a deed, but it is not shown that he had previously levied on the land. This will be presumed.³

VIII. An execution against C. is delivered to a deputy sheriff in December, returnable the third Tuesday in February. In March, C. sells a pair of horses which he had in his possession, when the execution was delivered and before the return day. Afterward the deputy sheriff sells the horses at sheriff's sale under the execution. In an action by the purchaser from C. it will be presumed that a levy has been made before the return day.⁴

IX. The seal of a court of a foreign State is affixed to a paper by impression without wax. The presumption is that the sealing is proper according to the laws of the State.⁵

X. A bill is filed to set aside a judgment entered against two defendants by one of them who alleges that he was never served with process in that suit. It appears that appearance was entered by some one. The presumption is that it was entered by an attorney duly authorized.⁶

XI. On the walls of a town in the military occupation of an enemy is posted a proclamation purporting to be signed by the general in command. The presumption is that it was done by order of the commander.⁷

XII. Under a statute an indenture of apprenticeship is not valid unless notice has been given to certain officers by certain other officers. An indenture being produced it will be presumed that the notice was given.⁸

¹ *Schermerhorn v. Talman*, 14 N. Y. 28 (1856).

² *Forsyth v. Clark*, 21 N. H. 409 (1850); *Willis v. Lewis*, 28 Tex. 185 (1856); *Titus v. Kimbro*, 8 Id. 210 (1852).

³ *Jackson v. Shafer*, 11 Johns. 317.

⁴ *Hartwell v. Root*, 19 Johns. 346 (1822); 10 Am. Dec. 233 (1822).

⁵ *State v. Lawson*, 14 Ark. 114 (1833).

⁶ *Stubbs v. Leavitt*, 30 Ala. 222 (1837).

⁷ *Bruce v. Nicopulo*, 11 Ex. 129 (1855).

⁸ *King v. Whiston*, 4 Ad. & Ell. 667 (1836).

XIII. Certain proceedings of a municipal corporation are alleged to have taken place at an adjourned meeting. The presumption is that the meeting was properly and regularly adjourned.¹

XIV. A docket fee has been taxed by the officers of a court. The presumption is that this was legal.²

XV. The presumption is that a clerk issues an execution only under the direction of some person authorized to control the writ.³

XVI. One of the witnesses to a deed is a magistrate. The presumption is that he saw it legally executed.⁴

XVII. A return of service of a summons of an officer is not dated. The presumption is that it was served within the legal time.⁵

XVIII. The law requires that an administrator shall settle up an estate within two years. The presumption, in a particular case, is that a particular administrator has done so.⁶

XIX. A clerk in making a transcript of a record for the Supreme Court copies therein a mortgage to which is appended a certificate of acknowledgment purporting to have been made by a notary public. Opposite to the signature at the end of the certificate, the copyist places a scrawl and the word "seal." The presumption is that this was a representation of the notary's official and not his private seal.⁷

XX. An execution is issued and placed in the hands of the sheriff, who levies upon certain real estate. It is found several years afterwards in the clerk's office. The presumption is that the sheriff returned it there as required by law to do.⁸

XXI. There is no place of service mentioned in a constable's return. The presumption is that it is within his precinct.⁹

XXII. A is a public surveyor regularly appointed. The presumption is that he has a knowledge of the art of surveying.¹⁰

XXIII. A party testifies that at the time of filing a mortgage for record no other incumbrance on the property appeared on the books. The recorder testifies that it did. The presumption is in favor of the recorder.¹¹

¹ *Freeholders v. State*, 24 N. J. (L.) 718 (1853).

² *Governor v. Ridgway*, 13 Ill. 14 (1850).

³ *Niantic Bank v. Dennis*, 37 Ill. 381 (1865).

⁴ *Durkins v. Moore*, 17 Ga. 62 (1855); *Hughfield v. Phelps*, 50 Ga. 59 (1874).

⁵ *Bald v. Jordon*, 56 Ga. 223 (1876).

⁶ *Ingram v. Ingram*, 4 Jones (L.), 188 (1856).

⁷ *Moore v. Titman*, 33 Ill. 358 (1864).

⁸ *Conwell v. Watkins*, 71 Ill. 488 (1874).

⁹ *Richardson v. Smith*, 1 Allen, 541 (1861).

¹⁰ *Ashe v. Lanham*, 5 Ind. 434 (1854).

¹¹ *Vandercock v. Baker*, 48 Iowa, 199 (1878).

XXIV. A. sues B., an examiner of title, for damages for failing to show the fact of a judgment and sale of the land. The judgment and sale are proved, but there is no proof that they were recorded. The presumption is that the officers did their duty and recorded them.¹

XXV. The law requires land sold upon execution to be first appraised. Certain land is sold on an execution. The presumption is that it was properly appraised.²

XXVI. An executor makes oath that all legal taxes due by the deceased have been paid by him since he qualified as executor, but can not swear as to taxes before the death of the testator. The presumption is that they also have been paid.³

So a court will presume that the Legislature acted properly.⁴ An act, for example, is found among the printed laws bearing the approval of the Governor. The presumption is that it was constitutionally passed.⁵ So verbal changes were made in a constitution after it was reported by the revising committee. These are presumed to have been authorized.⁶ Again, a statute gives a certain right of action to children or their "legal representatives." In a subsequent code giving a similar action these words are omitted. The presumption is that the Legislature intended to omit these words,⁷ and generally a statute is presumed to be constitutional,⁸ and so a municipal ordinance is presumed to be regular.⁹

In a Georgia case the court say: "The next error alleged was the admission of the exemplified copy of the will. It came as a copy of a record from the ordinary's office of Chatham County. It could not have got on record unless it had been proven, and the presumption is that it was duly

¹ *Chase v. Heaney*, 70 Ill. 268 (1873).

² *Mercer v. Doe*, 6 Ind. 80 (1854); *Evans v. Ashby*, 23 Ind. 15 (1864), and see *Banks v. Bales*, 16 Ind. 423 (1861); *Piel v. Brayer*, 30 Ind. 333 (1868).

³ *Aikin v. Altoona Iron Works*, 43 Ga. 464 (1871).

⁴ *Supervisors of Schuyler Co. v. People*, 26 Ill. 183 (1860); *Illinois Cent. R. Co. v. Wren*, 43 Ill. 77 (1867).

⁵ *Bedard v. Hall*, 44 Ill. 91 (1867).

⁶ *Walsh v. City Council*, 67 Ga. 293 (1881).

⁷ *Miller v. Southwestern R. Co.*, 55 Ga. 143 (1875).

⁸ *South, etc., R. Co. v. Morris*, 65 Ala. 197 (1890); *Sadler v. Langham*, 34 Ala. 311; *Allison v. Thomas*, 44 Ga. 649 (1872).

⁹ *Van Hook v. City of Selma*, 70 Ala. 361 (1881).

admitted to probate.”¹ “We must presume,” it is said in another case, “that all alterations or interlineations made or appearing in a public record were done in a proper manner by the person having the care and custody thereof, or by some one in his office having authority so to do. In other words, the mere fact that a change has been made, in the absence of evidence showing the contrary, must be presumed to have been done in a proper and legitimate manner.”² And in another, “When notices, affidavits, etc., are directed to be preserved in a given office, a failure to find them there raises a presumption that no such documents ever existed.”³

In another case it is said: “We hold it to be a sound principle, supported by both justice and reason that when there is a power of appointment which has been exercised, and there be a legal and an illegal mode of exercising it, and the proof leaves it doubtful which has been used, the legal presumption in favor of innocent purchasers or meritorious claimants is that it has been the legal one.”⁴

In case I. Lord Ellenborough said that if it was proved that these cutlasses were entered at the custom-house, he would presume *omnia rite acta*.

“We are of opinion,” it was said in case III., “that the order as exhibited should *prima facie* be presumed to have been made in the mode prescribed by the charter. As functionaries acting openly for the welfare of the local public and under official responsibility, the acts of the mayor and counsel should in some degree be accredited as regular and legal; usurpation without an apparent motive should not be presumed; unanimity was indispensable to the legal authority to make the order—the order was made by the mayor and council and therefore upon the pleadings in the case we feel authorized to presume that the order was

¹ *Thursby v. Myers*, 57 Ga. 155 (1876).

² *Hommel v. Devinney*, 39 Mich. 523 (1878).

³ *Hall v. Kellogg*, 16 Mich. 135; *Morrill v. Douglass*, 14 Kas. 304 (1875).

⁴ *Marshall v. Stevens*, 8 Humph. 159; 47 Am. Dec. 601 (1847).

made by the unanimous vote of the mayor and councilmen in council."

In case XIII. it was said: "I am aware of no principle which forbids us to act upon the presumption applicable to courts of justice, and I think to public bodies intrusted with general powers like these boards that the adjournment was regularly made." So the law presumes that all officers intrusted with the custody of public files and records will perform their official duty by keeping them safely in their offices. Where a paper is not found where, if in existence, it ought to be deposited or recorded, the presumption, therefore, arises that no such document has ever been in existence; until this presumption is rebutted it must stand as proof of its non-existence.¹

In case XXVI. it was said: "The testator could not swear to that fact for the obvious reason that he was dead. The presumption, however, is, in the absence of any evidence to the contrary, that the testator when in life performed all his legal and social duties, and therefore paid all the legal taxes chargeable by law."

Sub-Rule 1. — *And the presumption in Rules 13 and 14 prevails as to the authority and acts of private officers.*

Illustrations.

I. An act incorporating a bank requires the bonds of officers to be approved by the board of directors. An action is brought on the bond of a cashier of a bank. There is no record of its approval by the board. This will be presumed.²

II. An action is brought against the maker of a note made to a corporation indorsed to the plaintiff "G. H. F., president." The presumption is that the indorser had authority to make the indorsement.³

III. Certain persons are proved to have acted as officers of a corporation. They are presumed to be rightly in office.⁴

¹ Hall v. Kellogg, 16 Mich. 135 (1867); Platt v. Stewart, 10 Id. 260.

² Bank of the United States v. Dandridge, 12 Wheat. 64 (1827).

³ Cabot v. Given, 45 Me. 144 (1858). And see Stevenson v. Hoy, 43 Pa. St. 191 (1882); Seeds v. Kahler, 76 Id. 263 (1874).

⁴ Hilliard v. Gould, 34 N. H. 230 (1856).

IV. A complaint is filed in court in the name of a State and signed by certain attorneys. The presumption is that they had the authority of the Governor to do so.¹

V. A suit is brought in the name of a corporation. Its assent is presumed.²

VI. The seal of a corporation is affixed to a contract produced. The presumption is that this was done by authority.³

VII. B., who was superintendent of wharves, ordered the removal of a brig from the plaintiff's wharf, where she was discharging, to make room for another vessel to lie at an adjoining wharf, whereby the plaintiff lost certain wharfage. In an action by him against B. the presumption is that B. acted within his duty and without malice.⁴

In case I. Mr. Justice Story has given an exhaustive review of this principle. "By the general rules of evidence," said he, "presumptions are continually made in cases of private persons, of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle the law itself, for the purpose of strengthening the infirmity of evidence and upholding transactions intimately connected with the public peace and the security of private property, indulges its own presumptions. It presumes that every man in his private and official character does his duty until the contrary is proved; it will presume that all things are rightly done unless the circumstances of the case overturn this presumption, according to the maxim, *omnia præsumentur rite et solemniter esse acta donec probetur in contrarium*. Thus it will presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer; that upon proof of title matters collateral to that title shall be deemed to have been done; as for instance, if a grant or feoffment has been declared an attornment will be

¹ *Alexander v. State*, 56 Ga. 478 (1876).

² *Bangor, etc., R. Co. v. Smith*, 47 Me. 45 (1859).

³ *Solomon's Lodge v. Montmolin*, 58 Ga. 547 (1877). So the presumption is that a quorum of members were present at a business meeting of a corporation. *Citizen Mut. Ins. Co. v. Sortwell*, 8 Allen, 217 (1864).

⁴ *Gregory v. Brooks*, 37 Conn. 365 (1870).

intended, and that deeds and grants have been accepted, which are manifestly for the benefit of the party. The books on evidence abound with instances of this kind, and many will be found collected in Mr. Starkie's late valuable treatise on evidence. The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted, and slight acts on their part which can be reasonably accounted for only upon the supposition of such acceptance are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for that purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful and the delegated authority will be presumed. If a person acts notoriously as the cashier of a bank and is recognized by the directors or by the corporation as an existing officer, a regular appointment will be presumed; and his acts as cashier will bind the corporation although no written proof is or can be adduced of his appointment. In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions from acts done of what must have preceded them as matters of right or matters of duty."

In case II. it was said: "It is said that the case does not show that F. was president of the company because it was not proved by the record of his appointment. There are some cases in which a corporation is a party involving the authority of the officers in which their authority must be proved by the record. But the cases are numerous in which their authority has been proved by parol evidence. In this case the action is between other parties, neither of whom

has the custody of the records, and before a court in another State, so that there is no compulsory process by which they can be produced. It is proved that F. was the acting president prior and subsequent to the time when the note was transferred. He signed the policy of insurance as president for which the note was given, only one month before it was transferred ; and no annual meeting could have intervened for the choice of any one in his place. We think the evidence is sufficient that he was authorized to act as president at the time. But it is said that if he was president of the company, and so according to the customary mode of transacting such business, authorized to transfer the note, the presumption that he was so authorized is disproved by the by-laws which are a part of the case. And it is true that no specific authority to indorse notes is given by the code or by-laws to the president or to any other officer of the company. But it does not follow that such authority is not necessarily implied in powers which are granted. And it should be remembered that this is not an action against the company as indorsers upon the contract of indorsement. It is a suit between other parties involving only the authority of the president to sell the note in payment of a demand against the company, and in addition to the presumption arising from the usual course of such transactions, the president is made by the by-laws *ex officio* treasurer ; and so he had the legal custody of the assets."

"The question in this case," it was said in case VII., "is not simply whether the defendant acted improperly, or without strict legal right, or even maliciously, but whether he was actuated in making and enforcing the orders complained of by a design and intention to break up the contract relation existing between the plaintiff and the captain of the brig Brilliant, and thereby injure the plaintiff by preventing him from acquiring his expected wharfage. The case turns on the proof of that design, and the evidence in the case does not furnish any such proof on which a jury could properly find a verdict, nor

in our opinion would the evidence have been sufficient, if the plaintiff had shown that the relations between him and the defendant were unfriendly. Every positive, energetic and independent man is liable to have enemies, and to have an unfriendly state of feeling existing between him and other individuals. When such a man accepts an office whose duties, properly exercised, will necessarily bring him in conflict with the interests and prejudices of others, and those with whom his relations are not friendly, his motives will naturally be suspected and impugned; but he will be protected by the presumptions of the law in the performance of the duties required of him, unless it is clearly shown that his motives are private and malicious, and that he has wantonly and unnecessarily used the power incident to his official state to gratify a personal spirit of revenge. We discover nothing in this case which rebuts the presumption that the defendant was acting under a sense of official responsibility and with a view to an honest discharge of public duty. The brig Brilliant had lain at the wharf of the plaintiff from the 21st to the 26th of September, covering part of the wharf of Miller & Co. Miller & Co. had a grain elevator upon their wharf, and there was a canal boat lying in the stream loaded with grain consigned to them which could not come to their wharf and elevator, because it was in part occupied, as well as the wharf of the plaintiff, by the brig. The defendant was superintendent of wharves, or supposed himself to be, and had in his possession the certificate of the mayor that he was, and it is to be presumed was acting rightfully in ordering the brig to be hauled astern. It is immaterial whether he was harbor master or not, for the duty of a harbor master is to regulate the location of vessels in the stream. It is sufficient that he was the superintendent of wharves, *de jure* or *de facto*, or honestly supposed himself to be such, and believed it to be his duty to order the brig astern and permit the barge to haul in, so that both might be accommodated, and acted accordingly and did not act with the design imputed to him.

The object and purpose of his order appeared upon its face. It was a reasonable and proper order under the circumstances, and one which it appertained to his office to give. The brig had already covered the wharf of Miller & Co. and excluded the barge for five days, and but half her cargo was discharged, and five days more would have been required to complete the discharge. That would have been an unreasonable time to have kept the barge lying in the stream waiting the convenience of the plaintiff and probably subjecting Miller & Co. to heavy demurrage. Under such circumstances it was the right of Miller & Co. to have the brig hauled astern far enough to permit the barge to come to their wharf, and the clear and imperative duty of the defendant to give the order that he gave, and enforce it energetically and determinedly. If for any good reason the brig could not be hauled astern safely, and the plaintiff had another wharf where the brig could be unloaded, as it appears he had, the defendant would have been justified in ordering the captain of the brig to remove his vessel to the other wharf, where he did move it, to complete her discharge, for the barge could be unloaded at no other place than at the wharf and elevator of Miller & Co. Such an order would have been nothing more than enforcing good neighborhood, and a just regard for their mutual rights and accommodation, between these adjoining wharf owners. The presumption alluded to, and the inference arising from this state of facts, that the defendant was governed in his conduct by a sense of official duty, and not by a design to injure the plaintiff through his contract relation as a wharfinger with the captain of the *Brilliant*, is exceedingly strong; and the fact, however clearly proved, that the personal relations of the plaintiff and defendant were unfriendly would be entitled to little, if any, weight to rebut the presumption or negative the inference, and if that was all the plaintiff sought to prove we should affirm the judgment without hesitation. But it appears from the motion for a new trial that the plaintiff proposed to go beyond the mere

state of unfriendliness in his proof, and how far and with what effect he would have done so if permitted we are unable to see. We think he should have been permitted to prove any acts of hostility and the circumstances under which they occurred, from which an inference could be drawn consistently with the rules of law in other respects, that the plaintiff was governed in his conduct by the design imputed to him and which constitutes the gist of the action. Because such evidence was excluded we feel constrained to grant a new trial. But we deem it our duty to say that, unless the plaintiff can produce evidence, other than mere unfriendliness, to rebut the presumption that the defendant was acting from right motives, and the supporting inference arising from the fact that a case existed calling imperatively for his official interference in some way for the protection of Miller & Co., the non-suit should be promptly renewed."

CHAPTER IV.

THE REGULARITY OF BUSINESS AND UNOFFICIAL ACTS.

RULE 15. — In commercial transactions the presumption is that the usual course of business was followed by the parties thereto.

“Where,” it was once said by an English judge, “the maxim of *omnia rite acta præsumuntur* applies, there indeed if the event ought probably to have taken place on Tuesday, evidence that it did take place on Tuesday or Wednesday is strong evidence that it took place on Tuesday.”¹

Illustrations.

I. In an action against the acceptor of several bills of exchange which were made in November, 1850, and became due on February 5th, and March 12th, 1851, the defense is that they were accepted by the defendant while an infant. It is proved that the defendant came of age March 11th, 1851. The presumption is that all the bills were accepted before he attained his majority.²

II. It is alleged in a bill for relief that a certain agreement was in writing. The presumption is that it was signed.³

III. A. and B. are proved to be carrying on business in partnership. The presumption is that they are interested in equal shares.⁴

IV. It is the usage at a Boston hotel to deposit all letters left at the bar in an urn kept for that purpose whence they are distributed every fifteen minutes to the rooms of the different guests to whom they are addressed. B. is a guest at the hotel on a day on which A. leaves at the bar a letter addressed to B. The presumption is that the letter was received by B.⁵

¹ *Avery v. Bowden*, 6 E. & B. 973 (1856); *Brownell v. Palmer*, 23 Conn. 121 (1852).

² *Roberts v. Bethall*, 12 C. B. 779 (1852).

³ *Rist v. Hobson*, 1 Sim. & Stu. 543 (1824).

⁴ *Farrar v. Beswick*, 1 Moo. & R. 527 (1836); *Brewer v. Browne*, 68 Ala. 210 (1860). “Where there are two or more persons acting as partners, the presumption is that they are equal in interest in the business engaged in, and the property owned by them in the firm name.” *Moore v. Bare*, 11 Iowa, 198 (1860).

⁵ *Dana v. Kemble*, 19 Pick. 112 (1837).

V. Parties conduct a business together. The presumption is that they are partners.¹

VI. A. sues B. for the price of certain goods made and delivered by A. to B. The defense is that they are not of the quality ordered. The fact that B. accepted them and kept them for some time without complaint, raises a presumption that he had waived all objections.²

VII. The question is whether L. was a partner in a certain firm. Letters are produced written by L. in the name of the firm, and entries made by him in the firm books. This raises a presumption that he was.³

VIII. A note is executed by B., a member of the firm of B. & Co. This is presumed to be a firm note and will bind the firm.⁴

IX. Notes and accounts past due are received by an attorney. The presumption is that he receives them for collection.⁵

X. Certain books of account of a partnership are produced in evidence. They are presumed to be correct.⁶

XI. A. sells goods to B. The presumption is that the goods are to be paid for on delivery.⁷

XII. A. lends a sum of money to B. The law presumes a promise on the part of B. to repay A.⁸

XIII. A. accepts a draft on him drawn by B. The presumption is that A. at that time had funds of B.'s in his hands with which to pay it.⁹

XIV. A. is employed by B. at a monthly salary. The presumption is that A. was engaged by the month and not for any definite period.¹⁰

XV. Freight is earned by a vessel. It is presumed to belong to the owners of the vessel.¹¹

XVI. An entry is made by a clerk in his books of goods sold to A. The clerk is dead. The presumption is that the goods were delivered.¹²

¹ *McMullan v. Mackenzie*, 2 G. Greene, 368 (1849); and see *Ferris v. Kilmer*, 47 Barb. 411 (1866).

² *Davis v. Fish*, 1 G. Greene (1a.), 406; 48 Am. Dec. 387 (1848); and see *Minor v. Edwards*, 12 Mo. 137; 49 Am. Dec. 121 (1848). The waiver of the State's power to tax is never presumed. *Battle v. Mobile*, 9 Ala. 234; 44 Am. Dec. 438 (1846); *Mayor of Baltimore v. Baltimore, etc., R. Co.*, 6 Gill, 288; 48 Am. Dec. 530 (1848).

³ *Lewis v. Post*, 1 Ala. 65 (1840).

⁴ *Jones v. Rives*, 3 Ala. 13 (1841).

⁵ *Mardis v. Shackelford*, 4 Ala. 493 (1842).

⁶ *Routen v. Bostwick*, 59 Ala. 360 (1877); *Desha v. Smith*, 20 Ala. 747.

⁷ *Roberts v. Wilcoxson*, 88 Ark. 364 (1890).

⁸ *Swift v. Swift*, 46 Cal. 267 (1873).

⁹ *Trego v. Lowrey*, 8 Neb. 238 (1879); *Kendall v. Galvin*, 15 Me. 131; 32 Am. Dec. 141 (1838).

¹⁰ *Jones v. Vestry of Trinity Church*, 19 Fed. Rep. 59 (1883).

¹¹ *Williams v. Insurance Co.*, 1 Hilt. 345 (1867).

¹² *Clarke v. Magruder*, 3 H. & J. 77 (1807).

XVII. A. sells goods to B. on credit. The presumption is that A. believed B. to be solvent at the time of the sale.¹

XVIII. A. and B. are in business together. The presumption is that the partnership is solvent.²

XIX. The question is whether A. is insolvent. It is proved that there are unsatisfied judgments against A. This raises the presumption that he is.³

XX. The question is whether B. is insolvent. A creditor cannot collect his debt from B. This raises a presumption of his insolvency.⁴

XXI. An envelope produced bears the post-mark and date of a certain office. This raises the presumption that the letter was mailed and sent at this time.⁵

XXII. Two persons sign a note. The presumption is that they are equally bound.⁶

XXIII. A letter is proved to have been written by A. The presumption is that it was signed by A.⁷

XXIV. An envelope containing a letter bears a post-mark. The presumption is that it has been through the mail.⁸

XXV. In an action for the conversion of a dwelling house removed from one lot to another, it does not positively appear whether the building was attached to the soil on either lots. The presumption is that it was.⁹

XXVI. An owner of land conveys a strip to a railroad company for its track of the value of \$60 for which he receives \$1,600. The presumption is that damages from risk of fire from the company's engines are included in the price.¹⁰

XXVII. A deed is proved to have been made and delivered to A.'s ancestor. The presumption is that it is in A.'s possession and control.¹¹

XXVIII. Two persons in possession of distinct portions of premises make a joint mortgage of them. The presumption is that they are equal owners of the premises and equally liable for the mortgage debt.¹²

¹ *O'Brien v. Norris*, 16 Md. 123 (1860). "The presumption both of law and of reason, in the absence of proof to the contrary is that when they sold the goods on a credit they believed the purchaser to be solvent and able to pay for them."

² *Wallace v. Hull*, 28 Ga. 68 (1859).

³ *Ansley v. Carlos*, 9 Ala. 979 (1846); *Lawson v. Orear*, 7 Ala. 784 (1844); *Reynolds v. Pharr*, 9 Ala. 560 (1846); *Beeson v. Wiley*, 23 Ala. 575 (1856).

⁴ *Bilberry v. Mobley*, 20 Ala. 260 (1852).

⁵ *New Haven County Bk. v. Mitchell*, 15 Conn. 206 (1842).

⁶ *Orvis v. Newell*, 17 Conn. 97 (1845).

⁷ *Lucas v. Brooks*, 23 La. Ann. 117 (1871).

⁸ *U. S. v. Noelke*, 17 Blatchf. 534 (1880).

⁹ *Northrup v. Trask*, 89 Wis. 515 (1876).

¹⁰ *Rood v. New York, etc., R. Co.*, 18 Barb. 80 (1854).

¹¹ *Newsom v. Davis*, 20 Tex. 425 (1857).

¹² *Stroud v. Casey*, 27 Pa. St. 471 (1856).

XXIX. Certain bank notes are proved to pass currently in the community. The presumption is that they are genuine.¹

XXX. It is the general custom at a mill to give a receipt to the owners of rice delivered there. A. delivers rice there. The presumption is that he was given a receipt.²

XXXI. A merchant renders an account to a customer. The customer keeps it without objection. The presumption is that it is correct.³

XXXII. A. demands payment of a sum of money of B. B. gives him it, stating that he does so on certain conditions. A. remains silent. The presumption is that A. acquiesces in the conditions.⁴

XXXIII. A. holds a note payable to bearer. A. is presumed to be the owner.⁵

In case *I. Jervis, C. J.*, said: "There is nothing on the face of the bill to show when it was accepted. Why then is it that this evidence is sufficient? It is because it must be presumed that the bill has been accepted during its currency, and consequently before the commencement of the action; because it is the usual course of business to present bills for acceptance before the time for the payment of them has run out, and within a usual time after the drawing of them. * * * I decide this case upon this broad ground,

¹ *Hummell v. State*, 17 Ohio St. 628 (1867). There is no presumption that a bond executed in Virginia during the war, but payable two years after date is payable in Confederate currency. *Dyerle v. Stair*, 28 Gratt. 800 (1877). Nor that a receipt for a certain number of dollars given by a master in chancery in North Carolina during the civil war, was meant to acknowledge the payment of that sum in gold or silver. If there is any presumption it is the reverse of this. *Melvin v. Stevens*, 84 N. C. 78 (1881).

² *Ashe v. De Rosset*, 8 Jones (L.) 240 (1830).

³ *Webb v. Chambers*, 3 Ired. (L.) 374 (1843).

⁴ *Hall v. Holden*, 116 Mass. 173 (1874).

⁵ *Stoddard v. Burton*, 41 Iowa, 582 (1875). An indorsement made at the time of the inception of a note is presumed to have been for the same consideration expressed by the note. If made subsequently to the date of the note, and without a prior indorsement by the payee, it is presumed to have been for a different consideration, and the party will be regarded as a guarantor; but if made after a prior indorsement by the payee, the law presumes it to have been done in aid of the negotiation of the note, and the party will be treated as a subsequent indorser. If made without date it will be presumed to have been made at the inception of the note. *Calburn v. Averill*, 30 Me. 810; 50 Am. Dec. 630 (1849). When a note is indorsed in blank, the presumption is that holder purchased it immediately from payee. *Peaslee v. Robbins*, 3 Metc. 164 (1841). The drawee of a check is presumed to know the signature of the drawer. *Redington v. Woods*, 46 Cal. 408 (1873). "If the defendant signed the check and it came into the hands of a bona fide holder, the presumption of law was that it was issued by the drawer, unless the contrary was shown by him." *Hoyt v. Seeley*, 18 Conn. 359 (1847).

that we are to presume, unless the contrary is shown, that a bill of exchange has been accepted, not on the day of its date, but within a reasonable time afterward. It is not to be presumed that the acceptance took place after the maturity of the bill. That view disposes of the case as to all these bills — as to five of them because they became due before the defendant attained the age of twenty-one, and as to the sixth, because a reasonable time for its acceptance had elapsed before the defendant's majority." And Maule, J., added: "Although it is not usual to accept a bill on the day on which it is drawn, it is usual to do so at some early opportunity after that day. Therefore, where the drawer and acceptor are both living in the same town, the presumption is that the bill is accepted shortly — within a few days — after it is drawn; it being manifestly the interest of the drawer to have a negotiable instrument made perfect as early as conveniently may be. The date of the bill, therefore, though not evidence of the very date of the acceptance, is reasonable evidence of the acceptance having taken place within a short time after that day, regard being had to the distance the bill will have to travel from the one party to the other. Upon the same principle upon which that presumption rests, it may be presumed in this case that the bills were accepted before they arrived at maturity."

"Where a partnership," said Parke, B., in case III., "is found to exist between two persons, but no evidence is given to show in what proportions the parties are interested, it is to be presumed that they are interested in equal moieties."

In case IV. it was said: "The evidence that a letter left at the Tremont House and addressed to B. actually reached him is of the same nature as a similar presumption arising from putting a letter so addressed into the post-office, and may even be considered as considerably stronger, inasmuch as there would be less probability of a failure."

So there is a presumption against the validity of a claim

which has long lain dormant.¹ So non-user of a patent “amounts to a very strong presumption as to the invention not being useful.”² So notice is presumed.³

Sub-Rule 1. — *Persons engaged in a particular trade are presumed to be acquainted with the value of articles bought and sold therein (A), the names under which they go in such trade (B), and the general customs obtaining and followed there (C).*

Illustrations.

A

I. A person takes some bank bills to a banker to be exchanged for gold, and the banker, after examining them, buys them from him at a discount. Afterwards discovering that one of the bills is worthless, he brings an action for the money he paid for it. He can not recover, there being no evidence of fraud or knowledge on the customer's part. The banker is presumed to be acquainted with the value of the bills purchased by him.⁴

B.

I. D. imports into New York a quantity of spelter, which under the name of tutenague is exempt from duty. The collector, however, claims and receives a duty of 20 per cent thereon, and subsequently D. sells the spelter to M. at long price, which by custom gives a purchaser the right to any drawback on duty which may be made. Afterward the collector decides that spelter is not dutiable, and pays back to D. the 20 per cent. In an action by M. claiming this duty M. can not recover, as the presumption is that both M. and D. knew at the time of the sale that the article was not dutiable.⁵

“It is a reasonable presumption,” it was said in case I., “that those who are dealing in articles of commerce, especially those who purchase by wholesale from the importers, are acquainted with the different names by which such articles are known to the commercial world. And if

¹ *D. T. v. D. L. R.*, 1 P. & D. 127 (1857); *Sibbering v. Earl of Balcarras*, 3 DeG. & Sm. 735 (1850).

² *In re Bakewell's Patent*, 15 Moore P. C. 335 (1893).

³ *Mayor of Atlanta v. Perdue*, 50 Ga. 607 (1875); *Chapman v. Mayor of Macon*, 55 Ga. 566 (1875).

⁴ *Hinckley v. Kersting*, 21 Ill. 247 (1859).

⁵ *Moore v. Des Arts*, 2 Barb. Ch. 636 (1848).

spelter was actually exempted from duty by the names used in the section of the statute relative to exempt articles, probably both parties to this sale had reason for believing that the claim made by the collector was unfounded and that it would probably be reversed, and the duties be refunded to the importer. If so, the purchaser should have made his contract with reference to that event, so as to secure for himself the benefit of the refunded duty in case it should turn out that the collector was wrong."

C.

I. A. employs B., a broker, to trade for him on the Stock Exchange. The general rules of the Exchange are presumed to be known to A., and B. has an implied authority to contract in accordance therewith.¹

II. It is the general custom in a certain trade to charge interest on accounts after a fixed time. Parties dealing therein are presumed to be cognizant of this custom, and are bound by it.²

III. It is the general custom of a bank to demand payment of notes and give notice on the fourth instead of the third day after they are due. Persons negotiating notes at this bank, or making commercial paper for the purpose of having it negotiated there, are presumed to know this custom.³

IV. A dry goods salesman sues B., his employer, for wrongful dismissal. There is a general custom in the dry goods trade, that when a clerk or salesman begins a season without a special contract, he can not be dismissed until the end of it. Both A. and B. are presumed to know this custom.⁴

All trades have their usages, and when a contract is made with a man about the business of his craft, it is framed on the basis of such usage, which becomes a part of it, unless there is an express stipulation to the contrary.⁵

¹ *Sutton v. Tatham*, 10 Ad. & Ell. 27; *Bayliffe v. Butterworth*, 1 Ex. 25.

² *McAlister v. Reab*, 4 Wend. 483, 8 Id. 109; *Meech v. Smith*, 7 Id. 815.

³ *Mills v. Bank of U. S.*, 11 Wheat. 431; *Renner v. Bank of Columbia*, 9 Id. 589; *Bank of Washington v. Triplett*, 1 Pet. 26; *Yeaton v. Bank of Alexandria*, 5 Cranch, 9; *Smith v. Whiting*, 13 Mass. 6; *Dorchester, etc., Bank v. New England Bank*, 1 Oush. 177.

⁴ *Given v. Charron*, 15 Md. 502, and see *Lyon v. George*, 44 Md. 296.

⁵ *Pittsburg v. O'Neill*, 1 Penn. St. 343; *Rindskoff v. Barrett*, 14 Iowa, 101; *Beatty v. Gregory*, 17 Id. 109; *Toledo, etc., Insurance Co. v. Speares*, 16 Ind. 52; *Grant v. Lexington Fire Insurance Co.*, 5 Id. 23; *Barrett v. Williamson*, 4 McLean, 589; *Greaves v. Legg*, 11 Ex. 642; 2 H. & N. 210. In a New York case *Folger, J.*, said: "There are

In case I. it was said: "A person who deals in a particular market must be taken to deal according to the custom of that market, and he who directs another to make a contract at a particular place must be taken as intending that the contract may be made according to the usage of that trade."

In case II. it was said: "The uniform custom of a merchant or manufacturer is presumed to be known to those in the habit of dealing with him, and in their dealings they are supposed to act in reference to that custom."

In case III. it was said: "The parties are bound by such usage whether they have a personal knowledge of it or not. In the case of such a note the parties are presumed by implication to agree to be bound by the usage of the bank at which they have chosen to make the security itself negotiable." It must be borne in mind, however, that this knowledge is presumed only where the custom is a general and notorious one. A local, special custom in a particular trade is not presumed to be known even to persons doing business therein.¹

Sub-Rule 2. — *An agreement to pay for services rendered and accepted is presumed(A) unless the parties are members of the same family or near relatives(B).*

Illustrations.

A.

I. It is proved that medical services were rendered by A., a physician to B., deceased. The law presumes a promise by B. to pay for them.²

cases of principal and agent where one has been sent by another to do acts in a particular business to be done at a particular locality—as on Stock Exchange—where the power to deal is a privilege obtained by the payment of a fee, and is restricted to a body which has for its regulation and government come under certain prescribed rules or established usages; and as the agent could not do the will of his principal nor could the principal himself, save in conformity with those rules or usages, it is held that the principal must be bound thereby, whether cognizant of them or not, and that ignorance will not excuse him." *Wells v. Bailey*, 49 N. Y. 464.

¹ *Miller v. Burke*, 68 N. Y. 625; *Flynn v. Murphy*, 3 E. D. Smith, 578; *Farmers, etc., Bank v. Sprague*, 52 N. Y. 606; *Pierpont v. Fowle*, 2 Woodb. & M. 23; *Smith v. Gibbs*, 44 N. H. 835.

² In re Scott, 1 Redf. (N. Y.) 234 (1847); and see *Barr v. Williams*, 23 Ark. 244 (1851), as to goods furnished.

In case I. it was said: "As regards the debt of the executor against the estate, which is for medical service and attendance, it is satisfactorily proved that he was the family physician of the testator; that he, as such, attended him for several years, for which he had not received any pay. These services being valuable, the law presumes a promise to pay. It is competent, however, for the opposing party to show that the services were rendered gratuitously."

B.

I. On the marriage of A. to B. the former goes to live with B.'s father by invitation, without any agreement as to payment of board for himself and wife. There is no presumption that he agreed to pay board.¹

II. A step-father assumes the parental relation toward B., an infant, the child of his wife by a former husband. On the other hand B. renders services to the step-father to a value in excess of his board and education. There is no presumption of a promise to pay for such services.²

III. The brother of A. after A.'s death presents a claim for services for a period of five years. During this time he was boarded and clothed by A. There is no presumption of an agreement to pay him for these services.³

IV. A. and his wife board and lodge in the house B., the brother of A., and assist him in carrying on his business. There is no presumption that either the services on the one hand or the board and lodging on the other were to be paid for.⁴

V. L. is the mother of K.'s wife and lives with them for ten years. There is no presumption of an agreement by her to pay for board, etc., during this time.⁵

VI. B. being out of employment goes to live with C., and while there performs certain services for C. B.'s mother and C.'s wife are cousins. The law implies an agreement to pay the value of such services.⁶

In case II. it was said: "Under certain circumstances where one man labors for another a presumption of fact will arise that the person for whom he labors is to pay him

¹ *Wilcox v. Wilcox*, 48 Barb. 327 (1867).

² *Williams v. Hutchinson*, 3 N. Y. 312 (1850); *Andrus v. Foster*, 17 Vt. 556 (1845).

³ *Bowen v. Bowen*, 2 Bradf. 336 (1853); *Robinson v. Cushman*, 2 Denio, 149; *Fitch v. Peckham*, 16 Vt. 150 (1844); *Weir v. Weir*, 3 B. Mon. 645 (1843).

⁴ *Davies v. Davies*, 9 C. & P. 87 (1839).

⁵ *King v. Kelly*, 28 Ind. 89 (1867); *Cable v. Ryan*, 26 Id. 207.

⁶ *Gallagher v. Vaught*, 8 Hun, 87 (1876).

the value of his services. It is a conclusion to which the mind readily comes from a knowledge of the circumstances of the particular case, and the ordinary dealings between man and man. But where the services are rendered between members of the same family no such presumption will arise. We find other motives than the desire of gain which may prompt the exchange of mutual benefits between them, and hence no right of action will accrue to either party, although the services or benefits received may be very valuable."

In case V. it was said: "The law takes notice very properly of the customs of hospitality and friendly intercourse usual among mankind. This is it seems to us the basis of the distinction between cases where the parties are not related by such ties, and those where they are so related. The counsel concedes that if the deceased had been K.'s mother, instead of the mother of his wife, the law of the case would have been so. We perceive nothing to warrant a distinction between the case put and the one before us."

In case VI. it was said: "Ordinarily where services are rendered by one person for another without any agreement in respect to compensation, the law will imply an agreement to pay what the services are fairly worth. There is, however, a well recognized exception to this general rule in respect to services rendered by near relatives and members of the same family, on the ground that the law regards such services as acts of gratuitous kindness and affection. * * * The defendant's wife and the plaintiff's mother are cousins. * * * They were not, therefore, related at all, except by affinity, and we think such relationship not sufficiently near to place the parties within the exception. We have been unable to find any reported case that carries the doctrine to that extent. In fact, although the elementary writers seem to lay down the exception as broadly as it is stated above, yet all the reported cases confine it to cases of claims between members of the same family, and the courts refuse to imply a

promise by reason of the existence of the family relation. * * * We do not think that the relation between the parties to this action was such as would prevent the law from implying an agreement to pay for services rendered."

Sub-Rule 3. — *Negotiable paper is presumed to have been regularly negotiated, and to be or to have been regularly held*¹ (A), *except where it was procured or put in circulation through fraud or duress or is illegal* (B).

Illustrations.

A.

I. A. is the holder of a promissory note. The presumption is that he is a *bona fide* holder for value received.²

¹ The legal presumption is that every promissory note was given in the course of business and for value and that it is to be paid by the maker as the primary debtor. *Bank of Orleans v. Barry*, 1 Denio, 116 (1845); *Miller v. McIntyre*, 9 Ala. 638 (1846); *Dickerson v. Burke*, 35 Ga. 325 (1858). "The presumption is that a note is of the value of the sum promised thereby to be paid." *Loomis v. Mowry*, 8 Hun, 811 (1876); *Woodworth v. Huntton*, 40 Ill. 131 (1865); *Curtiss v. Martin*, 20 Id. 557 (1858); *Kelley v. Ford*, 4 Ia. 140; *Trustees v. Hill*, 12 Id. 462; *Wilkinson v. Sargent*, 9 Id. 521; *Lathrop v. Donaldson*, 22 Id. 235 (1867); *Canal Bank v. Templeton*, 20 La. Ann. 141 (1868); *Scott v. Williamson*, 34 Me. 343 (1844); *Burnham v. Webster*, 19 Id. 333 (1841); *Earbee v. Wolfe*, 9 Port. 366 (1839); *Cook v. Helms*, 5 Wis. 107 (1856). But where fraud or illegality or duress is shown in its inception, the burden is on the holder to show regularity. *Bailey v. Bidwell*, 13 M. & W. 76; *Harvey v. Towers*, 6 Ga. 660; *Fitch v. Jones*, 5 El. & B. 338; *Catlin v. Hansen*, 1 Duer, 323; *Gwin v. Lee*, 1 Md. Ch. 445; *Munro v. Cooper*, 5 Pick. 412; *Sisternans v. Field*, 9 Gray, 333 (1867); *Tucker v. Morrill*, 1 Allen, 528 (1861); *Beltzhofer v. Blackstock*, 3 Watts, 26; *Vallet v. Parker*, 6 Wend. 615; *Bissell v. Morgan*, 11 Cush. 198 (1853); *Perrin v. Noyes*, 39 Me. 384 (1855); *Ellicott v. Martin*, 6 Md. 509 (1854); *Paton v. Coit*, 5 Mich. 506 (1858); *Clark v. Pease*, 41 N. H. 414; *Garland v. Lane*, 46 Id. 245; *Perkins v. Prout*, 47 Id. 389 (1867); *Farmers', etc., Bank v. Noxon*, 45 N. Y. 762 (1871); *Nickerson v. Ringer*, 76 N. Y. 279 (1879); *Sperry v. Spalding*, 45 Cal. 344 (1873). In Alabama want of consideration, like fraud casts the burden on the holder. *Wallace v. Bank*, 1 Ala. 567; *Marston v. Forward*, 5 Id. 347; *Thompson v. Armstrong*, 7 Id. 256; *Boyd v. Molver*, 11 Id. 823 (1874); *Ross v. Dunham*, 35 Id. 434 (1860). But the English rule is that where there is "no fraud nor any suspicion of fraud, but the simple fact is that the defendant received no consideration for his acceptance, the plaintiff is not called upon to prove that he gave value for the bill." *Whitaker v. Edmunds*, 1 M. & R., 1 Ad. & Ell. 638, overruling *Thomas v. Newton*, 2 O. & P. 606, and *Heath v. Sanson*, 2 B. & Ad. 291. And see *Robinson v. Reynolds*, 2 Q. B. 634; *Bailey v. Bidwell*, 13 M. & W. 72; *Berry v. Alderman*, 14 C. B. 96; *Smith v. Brame*, 16 Q. B. 244. And the same rule is followed in most of the States. *Holme v. Karpser*, 5 Binney, 465; *Knight v. Pugh*, 4 W. & S. 445; *Morton v. Rogers*, 14 Wend. 576; *Rogers v. Morton*, 12 Id. 484; *Vather v. Zane*, 6 Gratt. 246; *Wilson v. Laxter*, 11 Gratt. 477; *Tucker v. Morrill*, 1 Allen, 528 (1861).

² *Goodman v. Simonds*, 20 How. 343 (1857); *Lehman v. Tallahassee Manfg. Co.*, 64 Ala. 567 (1879); *First Nat. Bank v. Green*, 43 N. Y. 298 (1871).

II. In an action on a promissory note by the holder against the indorser, it is not alleged that the plaintiff is a holder for value. This is presumed.¹

III. An action is brought on a negotiable promissory note indorsed to the payee in blank. The defense is failure of consideration. The presumption is that it was transferred to the plaintiff on the day of its date.²

IV. A note is indorsed without date. The presumption is that the indorsement was made before the note became due.³

“The law was thus framed and has been so administered,” it was said in case I., “in order to encourage the free circulation of negotiable paper by giving confidence and security to those who receive it for value; and this principle is so comprehensive in respect to bills of exchange and promissory notes which pass by delivery, that the title and possession are considered as one and inseparable, and in absence of any explanation, the law presumes that a party in possession holds the instrument for value until the contrary is made to appear, and the burden of proof is on the party attempting to impeach the title. These principles are certainly in accordance with the general current of authorities and are believed to correspond with the general understanding of those engaged in mercantile pursuits.”

In case II. it was said: “It does not expressly appear in the declaration that the indorsees are holders for value. Value is implied in every acceptance and indorsement of a bill or note. The burden of proof rests upon the other party to rebut the presumption of validity and value which

¹ *Clark v. Schneider*, 17 Mo. 295 (1852); *Poorman v. Mills*, 35 Cal. 118 (1868).

² *Noxon v. De Wolf*, 10 Gray, 343 (1858). In *Ranger v. Cary*, 1 Metc. 369, it was said: “A negotiable note being offered in evidence duly indorsed, the legal presumption is that such indorsement was made at the date of the note, or at least antecedently to its becoming due; and if the defendant would avail himself of any defense that would be open to him only in case the note was negotiated after it was dishonored, it is incumbent on him to show that the indorsement was in fact made after the note was overdue.” *Stevens v. Bruce*, 21 Pick. 193; *Webster v. Lee*, 5 Mass. 534; *Hendricks v. Judah*, 1 Johns. 319.

³ *Mobley v. Ryan*, 14 Ill. 51 (1852); *Pettis v. Westlake*, 3 Scam. 535; *Walker v. Davis*, 33 Me. 518 (1851); *McDowell v. Goldsmith*, 6 Md. 319 (1864); *Hopkins v. Kent*, 17 Id. 117 (1860).

the law raises for the protection and support of negotiable paper."

In case III. it was said: "In *Parkin v. Moore*,¹ it was held by Baron Alderson that the burden of proving that the note was indorsed after it was overdue was upon the defendant, where he sought to defend by showing such facts as would constitute a good defense to a dishonored note, and this ruling, being submitted to the other judges, was confirmed by them. It may be that under the more precisely accurate use of the term 'burden of proof' as now held by the court, it would have been more correct to say that upon the production by the holder of a negotiable promissory note, indorsed in blank, the legal presumption is that it was indorsed at its date, and it is incumbent on the defendants to overcome that presumption by evidence. This must have been so understood in the present case, as the plaintiff had already produced a note thus indorsed, and the question was upon the effect of the testimony offered to show that it was indorsed after overdue. Upon such a state of the case, it was the duty of the defendants to offer sufficient evidence to control the legal presumption arising from the indorsement of the note. In this sense the burden was upon the defendants."

B.

I. In an action on a bill of exchange by an indorsee against the acceptor, there is evidence that the bill has been procured by a fraud upon the defendant. This casts the burden of proving that he paid value for it on the plaintiff.²

II. In answer to an action on a promissory note the defendant pleads that it was illegal in its inception and that the plaintiff took it without value. The illegality is proved. The burden is cast on the plaintiff to show value.³

III. A check on a bank is given by S. to C., for a gaming debt. It is transferred to F., who brings suit on it against S. The burden is upon F. to prove that he took it *bona fide* and for value.⁴

¹ 7 O. & P. 408.

² *Ross v. Drinkard*, 35 Ala. 434 (1860); *Boyd v. McIver*, 11 Id. 823 (1847).

³ *Bailey v. Bidwell*, 13 M. & W. 74 (1844).

⁴ *Fuller v. Hutchins*, 10 Cal. 523 (1858).

“When,” it was said in case I., “the drawer or acceptor of a bill of exchange has proved that it was procured by fraud * * * the presumption that the indorsee paid value is overcome, and it is incumbent upon him to prove that fact before he can claim the protection which is vouchsafed by the law to a purchaser for value without notice.”

In case II. Baron Parke said: “It certainly has been the universal understanding that if the note were proved to have been obtained by fraud or affected by illegality, that afforded a presumption that the person who had been guilty of illegality would dispose of it, and would place it in the hands of another person to sue upon it; and that such proof casts upon the plaintiff the burden of showing that he was a *bona fide* indorsee for value.”

“With checks,” it was said in case III., “as with promissory notes, the presumption is that they are given upon a valid consideration, but this presumption being rebutted, the necessity is thrown upon the holder of proving that he received it in good faith, without notice of the illegality of the consideration.”

A note payable one day after date, it is held in Georgia, is not entitled to this presumption. “This position,” it was said, “assumes that the *onus* lies on the defendant to show that the plaintiff took the note after its maturity. Ordinarily, that is when the note has some time to run from execution to maturity, this is true; but we do not think that principle applies to notes like this due one day after date; for the time run is so short that it is not probable that it should be put in circulation before maturity, at least not sufficiently so to raise such a presumption of the holder. Notes given due and payable at the time of their execution or at one day after date, do not belong to that class of paper intended for negotiation and circulation for commercial purposes, in which all the presumptions are in favor of the holder in order to protect innocent purchasers and to encourage and foster their circulation; but they are

given more as an evidence of indebtedness by the maker to the payee.”¹

RULE 16.—The presumption is that any act done was done of right and not of wrong.

Illustrations.

I. A lease of dwelling houses contains a covenant on the part of the lessee that he will not, without the consent of the lessor, carry on any trade in any house. He afterwards converts one of them into a public house and grocery, and the lessor, with knowledge of it, receives the rent for more than twenty years. The presumption is that the lessor has licensed this use.²

II. An action is brought on a contract for goods sold. The goods are proved to be liquors. The presumption is that the plaintiff was duly licensed to sell them.³

“It is a maxim of the law of England,” it was said in case I. “to give effect to every thing which appears to have been established for a considerable length of time, and to presume that what has been done was done of right and not in wrong. That practically has caused a series of trespasses to constitute a right so that it may be said, a right has grown out of proceedings which are wrongful. But in truth it is nothing more than giving effect to notorious and avowed acquiescence. No person would have permitted a covenant to be broken for more than twenty years, unless he was aware that it was broken as a matter of right. It is not necessary in point of form to send the case to a jury to find the facts which the judge may tell them they ought to presume.”

RULE 17.—The performance of a mere moral duty is not presumed.

Illustrations.

I. A. sells goods to B. and B. sells them to C. C. sends his clerk to get them (they being still in A.'s possession), and they are delivered to

¹ Beall v. Leavertt, 22 Ga. 105 (1861).

² Gibbon v. Doeg, 3 H. & N. 615 (1867).

³ Horan v. Weiler, 41 Penn. St. 470 (1862).

the clerk on his promise that C. will pay A. In an action by A. against C. no presumption arises that the clerk communicated his bargain to C.¹

"I am clearly of opinion," said Willes, J., in case I., "that there was no evidence that C. authorized or ratified the promise made by his clerk. There being no original authority in him to make the promise, it was a thing done by him out of the ordinary scope of his duty; and although there was a moral duty cast upon him to communicate to his employer the fact of his having made the promise, it was nothing more than a moral duty, and the *omnia præsumuntur rite esse acta donec probetur in contrarium* is never applied to such a duty as that. There is, therefore, no presumption, either that the clerk did or did not perform that duty; and in the absence of positive evidence that the promise was communicated to C., the jury would not have been warranted in assuming that it was merely because the evidence was equally consistent with either supposition."

RULE 18.— Documents regular on their face are presumed to have been properly executed, and to have undergone all formalities essential to their validity.²

Illustrations.

I. A copy of an agreement in the hands of the opposite party is offered in evidence. It is objected that it must be first proved to be stamped as required by statute. The presumption is that the original is stamped.³

II. A statute provides that no recovery can be had on a foreign bill of exchange unless stamped at the time it is transferred. In an action on

¹ Fitzgerald v. Dressler, 7 O. B. (N. S.) 376 (1859).

² Freeman v. Thayer, 33 Me. 76 (1851); Munroe v. Gates, 48 Id. 463 (1860); see Stevens v. Taft, 3 Gray, 487 (1855); Sadler v. Anderson, 17 Tex. 245 (1856); Diehl v. Emig, 65 Penn. St. 327 (1870); Roberts v. Pillow, 1 Hempst. 634 (1851); Re British, etc., Assurance Co., 1 DeG., J. & S. 488 (1863); Lane's Case, Id. 504.

³ Crisp v. Anderson, 1 Stark. 35 (1815). "Am I to presume that this agreement is unstamped in favor of a defendant who refuses to produce it? I ought rather to presume *omnia rite acta* particularly after notice. I shall assume it to have been stamped until the contrary appears." Per Ellenborough, C. J., and see Closmadene v. Carrel, 18 O. B. 36 (1856); Fooley v. Goodwin, 4 Ad. & Ell. 94 (1835); Hart v. Hart 1 Hare, 1 (1841).

a foreign bill of exchange, the stamp is on the document when produced at trial; but there is no evidence that it was so when indorsed to plaintiff. The presumption is that it was so stamped at the time of the transfer.¹

III. An action of ejectment is brought on an assignment of a term to secure the payment of an annuity. A statute required that such deeds to be valid should be enrolled. This will be presumed to have been done.²

IV. The law requires contracts to be stamped. A contract is sued on. The presumption is that it was regularly stamped.³

V. A deed sent to a foreign country to be signed by a married woman is returned duly executed, and with an attestation clause that it was "signed, sealed, and delivered." There is no mark of a seal. The presumption is that the deed was sealed.⁴

VI. A deed concludes, "as witness our hands and seals," and the attestation clause speaks only of the "signing and sealing." The presumption is that it was duly delivered.⁵

VII. The attestation of a deed is in the usual form. The attesting witness testifies that he saw the party sign it, but does not remember that it was sealed and delivered. These things will be presumed.⁶

VIII. A witness to prove the execution of a bond does not recollect whether at the time it was executed it had any seal. The bond contained the words, "sealed with our seals," and had a seal at the time of the trial. The presumption is that there was a seal when executed.⁷

IX. A person's signature to a deed is proved, *i.e.*, that it is his handwriting. The sealing and delivery of the deed is presumed.⁸

X. Two deeds bear date on the same day. A priority of execution will be presumed to bear out the clear intention of the parties.⁹

¹ *Bradiagh v. DeRen*, L. R. 3 C. P. 286 (1868), and see *Marine Investment Co. v. Haviside*, L. R. 5 H. L. Cas. 624 (1873) where Lord Cairns said: "I take it to be clear that if an instrument is lost, and if there should be no evidence given respecting it on one side or the other, the presumption which ought always to be made and which always would be made by this court would be that the instrument was properly stamped."

² *Griffin v. Mason*, 3 Camp. 7 (1811).

³ *Thayer v. Barney*, 13 Minn. 513 (1867); *Smith v. Jordan*, 13 Id. 264 (1868).

⁴ *Re Sandilands*, L. R. 6 C. P. 411 (1871).

⁵ *Hall v. Bainbridge*, 12 Q. B. 699 (1848).

⁶ *Burling v. Patterson*, 9 C. & P. 570 (1840).

⁷ *Ball v. Taylor*, 1 C. & P. 417 (1824).

⁸ *Grellier v. Neale*, 1 Peake, 199 (1818); *Talbot v. Hodson*, 7 Taunt. 251 (1816); *Re Huckvale*, L. R. 1 P. & D. 375 (1867); *Adam v. Kerr*, 1 B. & P. 360; *Andrews v. Motley*, 13 C. B. (N. S.) 526; *Vermicombe v. Butler*, 3 Sw. & T. 580; *Spellsburg v. Burdett*, 10 Bl. & F. 840.

⁹ *Atkins v. Horde*, 1 Burr. 106 (1757)

XI. Property is conveyed by lease and release in one deed. Priority of execution of the lease will be presumed.¹

XII. In a conveyance of land, the grantor described himself as executor of him in whom the title last was. The presumption is that there was a will.²

XIII. A mortgage for purchase money given at the time a deed from A. to B. was made is produced, and is executed with proper formality. The deed is lost. The presumption is that it, also, was properly executed.³

XIV. A number of deeds are made to convey property to different persons, but it does not appear which was made first. The presumption is that they were made in proper order.⁴

XV. A deed is made to A. and B. jointly. The presumption is that they are equally interested.⁵

XVI. A warehouseman's receipt and guaranty indorsed thereon are produced. The presumption is that they were executed at the same time.⁶

XVII. There is no proof when a deed was delivered. The presumption is that it was delivered on the day it bears date.⁷

XVIII. A deed expresses on its face that the consideration was paid by the wife. The presumption is that it was her own money.⁸

XIX. A deed is duly attested. The presumption is that it was duly delivered.⁹

XX. A consideration in a deed is not expressed. It is presumed to be the value in money of the property.¹⁰

XXI. A plaintiff declares on a certain contract which the statute requires to be in writing. The presumption is that it is in writing.¹¹

XXII. A bill of complaint is brought on a certain agreement. It does not state whether it is in writing or not. If not in writing it would be void by statute. The presumption is that it is in writing.¹²

¹ *Barker v. Keets*, 1 Freem. 251 (1678); *Brice v. Smith, Welles*, 1 (1737).

² *Maverick v. Austin*, 1 Bailey, 59 (1828).

³ *Godfroy v. Disbrow, Walk.* (Mich.) 260 (1843).

⁴ *Dudley v. Cadwell*, 19 Conn. 219 (1848). But see *Bissell v. Nooney*, 33 Conn. 441 (1866).

⁵ *Long v. McDougald*, 23 Ala. 413 (1853).

⁶ *Underwood v. Hossack*, 38 Ill. 208 (1865).

⁷ *Smiley v. Fries*, 104 Ill. 416 (1882); *People v. Snyder*, 41 N. Y. 397 (1869); *Deininger v. McConnell*, 41 Ill. 237 (1866); *Hardin v. Crate*, 78 Ill. 583 (1875).

⁸ *Stall v. Fulton*, 30 N. J. (L.) 430 (1863). "If the whole of certain premises are conveyed for a given price, the necessary presumption is that some portion of that price is paid and received for every portion of the premises." *Nutting v. Herbert*, 37 N. H. 350 (1858).

⁹ *Powers v. Russell*, 13 Pick. 69 (1832).

¹⁰ *Clements v. Laudman*, 28 Ga. 401 (1858).

¹¹ *Gibbs v. Nash*, 4 Barb. 449 (1848); *Ooles v. Bowne*, 10 Paige, 526 (1844).

¹² *Printup v. Johnson*, 19 Ga. 75 (1856).

XXIII. There is no proof whether the signature of the maker of a deed or the subscribing witness was made first. The presumption is that the maker signed it first.¹

XXIV. A mortgage is executed on land in B. It is presumed to have been executed in the place where the land is situated.²

XXV. Real estate is sold by A. and B. jointly, and A. receives all the proceeds. The presumption is that A. and B. are joint owners, and that one-half the proceeds belongs to each.³

XXVI. It is uncertain whether a mortgage was paid before, at, or after the time it was due. The presumption is that it was paid on the day it was due.⁴

XXVII. In laying out a town the lots are numbered in regular arithmetical order. The lots are of one hundred acres each. The presumption is that they are located contiguous to each other, and that lot "8" includes all the land between "7" and "9."⁵

"It would be very inconvenient," it was said in case II., "for the plaintiff to be required to prove that the stamps were on the bills before their first indorsement to an English holder, as required by the act. There was *prima facie* evidence that the act had been complied with, and it was for the defendant to give evidence to rebut that."

In case III., Lord Ellenborough said: "If the annuity was not duly enrolled, that proof should come from the other side. Here is an assignment executed by the plaintiff. I will presume it to be valid until the contrary is shown."

In case IV., Bovill, C. J., said: "I think there is *prima facie* evidence that this deed was sealed at the time of its execution and acknowledgment by the parties. To constitute a sealing, neither wax nor wafer, nor a piece of paper, nor even an impression is necessary. Here is something attached to this deed which may have been intended for a seal, but which from its nature is incapable of retaining an impression. Coupled with the attestation and the certifi-

¹ Hughes v. Debnam, 8 Jones (L.), 129 (1860).

² Thayer v. Marsh, 11 Hun, 501 (1877).

³ Adams v. Leavens, 30 Conn. 73 (1849).

⁴ Johnson v. Carpenter, 7 Minn. 176 (1862).

⁵ Warren v. Pierce, 6 Me. 1 (1829); 19 Am. Dec. 189.

cate, I think we are justified in granting the application that the deed and other documents may be received and filed by the proper officer." Byles, J., said: "I am of the same opinion. The sealing of a deed need not be by means of a seal; it may be done with the end of a ruler or anything else. Nor is it necessary that wax should be used. The attestation clause says, that the deed was signed, sealed, and delivered by the several parties; and the certificate of the two special commissioners says that the deed was produced before them, and that the married women 'acknowledged the same to be their respective acts and deeds.' I think there was *prima facie* evidence that the deed was sealed." And Smith, J., added: "Something was done with the intention of sealing the deed in question. I concur in granting this application, on the ground that the attestation is *prima facie* evidence that the deed was sealed, and that there is no evidence to the contrary."

In case VIII., Best, C. J., said that if sealing and delivery were not presumed, and the proof had to rest upon the fallible memory of a witness at a distance of time, as to whether all the requisites were performed at that time, great danger would result to every kind of instrument after the lapse of years; and a member of the bar mentioned that he was once engaged in a case in which the lord chancellor held that similar evidence to that here produced was sufficient to raise the presumption that everything necessary was done, and that to rebut such presumption the contrary must be distinctly proved.

"Where a deed with the regular evidence of its execution upon the face of it is found in the hands of the grantee, the presumption is that it has been duly delivered."¹ So where each one of several joint owners of land takes into his possession separate parcels of the land, and the land is then separately held and claimed during many years, the presumption arises that a partition thereof was made be-

¹ Ward v. Lewis, 4 Pick, 518 (1837).

tween the parties, under which partition it has been thus held and enjoyed.¹

“Much is to be presumed in favor of ancient deeds if accompanied by possession, and the same rule may be applied to wills and to levies of executions to some extent.”²

In case XXII. it was said: “The bill is silent as to whether the agreement was in writing or not. If the agreement was such a one that it was required to be in writing by the Statute of the Frauds, then it is to be presumed until the contrary is shown, that the agreement was in writing, for it is, in general, to be presumed, until something to the contrary be shown, that no man does what the law forbids or what the law declares shall be invalid.”

In case XXVII. it was said: “It is the well known practices of proprietors of townships in this State, to have them surveyed out in ranges and lots, causing both to be numbered in regular sequence. They then sell by the number of the lot and range, without a more particular description, and the purchaser is entitled to his lot according to its actual location, as made by the survey, if that can be ascertained, if not, it is to be located from the plan of actual admeasurement. The plaintiffs are the owners of number eight, in the first range east in Baldwin, the plan of the town is lost, there is no question about the range lines, between which number eight lies. The plaintiffs show where numbers seven and nine are; and these lots are located beyond controversy. The judge instructed the jury that number eight must be presumed to extend from seven to nine; and that the burden of proof was upon the party interested to show a different location to do so by satisfactory evidence. He would have been justified in using stronger language; and in stating that eight did and must extend from seven to nine, unless a different original location could be shown.

¹ *Russell v. Marks*, 3 Metc. (Ky.) 87 (1860); *Munroe v. Gates*, 48 Me. 463 (1860).

² *Hill v. Lord*, 48 Me. 463 (1861); *Bond v. Searrell*, 3 Burr. 1773 (1764).

The burden of proof is doubtless upon the plaintiffs to make out their case; but when they show the range lines between which their lot is founded, and the side lines of the lots next below, and next above theirs in number, they have located their lot, and made out their case; if it be not successfully controverted by opposing testimony. The proprietors voted, it seems, to lay out their town in one hundred-acre lots. But it is of no consequence what they proposed or intended to do; the question is, what they have done, by their surveyors or other agents duly authorized. Their intention, as manifested by their vote, was very inaccurately executed; some of the lots exceeding the quantity, which is not unusual, from the liberal admeasurement formerly made; and some falling short of the number of acres proposed, which has less frequently happened. It is conceded that eight ought to adjoin seven, because the surveyor must have begun at one and progressed onwards; but it is argued that it would not conclusively follow that it would extend to nine; especially in the present instance, where the plaintiff claims two hundred acres, instead of one hundred, to which, it is insisted, his lot should be restricted; and that it ought rather to be presumed that the surveyor dropped or omitted a lot in his numbering. But it must be considered that there is precisely the same reason for presuming that nine adjoins eight, as that eight adjoins seven. The line, therefore, adjoining seven is no better established than that which adjoins nine. If the defendant could have shown original corners, or a line dividing the space between seven and nine, the case would have been differently presented. But the burden of proof was upon him to do this; and as he failed to do it, eight must be located as it stands numerically adjoining seven on one side, and nine on the other. Selling, as the proprietors do, by the number of the lot and of the range, the range and lot lines are referred to as monuments, and when found, will govern and control courses, distances and quantities."

Sub-Rule 1. — *Dates are presumed to be correct, when found in written instruments (A), but are no evidence of collateral facts (B).*

Illustrations.

A.

I. In an action, to prove notice of certain facts to a person at a certain time, it is proposed to read certain letters written by him at that time. There is nothing to show that they were written at that time except their date. The presumption is that they were written at the time they bore date.¹

II. The question is, at what time a bill of exchange was issued. The presumption is it was issued at the time it bears date.²

III. The question is, when a certain payment was made. A receipt is produced dated September 8th. The presumption is that it was made on that day.³

IV. The day of the execution of a deed is disputed. The presumption is that it was executed on the day it bears date.⁴

V. There are certain indorsements on a promissory note of receipt of interest. It being material to know at what time they were made, the presumption is that they were made at the time they bear date.⁵

VI. A deed is dated April 3d. The presumption is that it was executed on that day.⁶

VII. A note is dated July 1, 1874. The presumption is that it was executed on that day.⁷

VIII. An assignment is dated on a certain day. The presumption is that it was made on that day.⁸

¹ *Potter v. Glossop*, 3 Ex. 192 (1848); *Sinclair v. Baggaley*, 4 M. & W. 312; *Malpas v. Clement*, 19 L. J. (Q. B.) 435 (1850); *Butler v. Mountgarret*, 7 H. L. Cas. 647 (1859); *Morgan v. Whitmore*, 6 Ex. 713 (1851); *Baker v. Melburn*, 3 M. & W. 853 (1837); *Hunt v. Massey*, 1 B. & Ad. 902 (1834); *Pullen v. Hutchinson*, 25 Me. 249 (1845); *Meldrum v. Clark, Morris (la.)*, 130 (1841); *Abrams v. Pomeroy*, 13 Ill. 133 (1851); *Williams v. Woods*, 16 Md. 220 (1860); *Breck v. Cole*, 4 Sandf. 80 (1850).

² *Anderson v. Weston*, 6 Bing. (N. C.) 296 (1840); *Laws v. Rand*, 3 O. B. (N. S.) 445 (1857); *Claridge v. Kleet*, 15 Pa. St. 255 (1850). An exception exists in the English courts in the case of proof of a petitioning creditor's debt in bankruptcy proceedings. *Wright v. Lawson*, 2 M. & W. 739 (1837).

³ *Childwell v. Gamble*, 4 Watts, 292 (1835).

⁴ *Costigan v. Gould*, 5 Denio, 290 (1848); *Pullen v. Hutchinson*, 25 Me. 249 (1845).

⁵ *Smith v. Battens*, 1 Moo. & R. 341 (1834).

⁶ *Smith v. Porter*, 10 Gray, 66 (1857).

⁷ *Knisely v. Sampson*, 100 Ill. 573 (1881).

⁸ *Byrd v. Tucker*, 3 Ark. 451 (1840).

IX. A bill or note is indorsed in blank. The presumption is that it was indorsed on the day of its date or before due.¹

X. A name is written on the back of a note. The presumption is that it was put there at the time of the making of the note.²

XI. The question is at what time an action of replevin was commenced. The writ is produced bearing date, July 11, 1860. The presumption is that the action was commenced on that day.³

XII. An action is on a promissory note. The writ is dated April 15, 1894, one day before the expiration of six years which would bar the action. It is not served until April 24th. The presumption is that the action was commenced on April 15th.⁴

XIII. A written paper containing a statement of mutual accounts between a creditor and a bankrupt by whom it was signed, and bearing date previous to the bankruptcy shows a balance due to the creditor. This is *prima facie* evidence as against the assignees in an action brought by them against the creditor that it was written at the time it bore date.⁵

XIV. To rebut a charge of cruelty certain letters are introduced, written by the wife to the husband. There is no presumption that they were written when they were dated.⁶

In case III. it was said: "The objection is that there is no proof, except what appears on the face of the receipt itself, that it was given on the 8th of September. * * * We have come to the conclusion that the presumption is that it was fairly done, as the law never presumes fraud; and that the receipt should be received, with proper directions from the court that if manufactured by the parties it should be entitled to no weight. It is a transaction in the usual course of business, as it is well known that receipts for the payment of money are frequently given without witness of the payment."

"As to the *time*," said Taunton, J., in case V., "I have no doubt, if the indorsements were not written at the time

¹ *Hutchins v. Flintge*, 2 Tex. 473 (1849).

² *Benthall v. Judkins*, 13 Metc. 285 (1847).

³ *Federhen v. Smith*, 3 Allen, 119 (1861); *Bunker v. Shed*, 8 Metc. 150 (1844); *Lyle v. Bradford*, 7 T. B. Mon. 116 (1838); *Day v. Lamb*, 7 Vt. 426 (1835). But it is not conclusive.

⁴ *Gardner v. Webber*, 17 Pick. 407 (1835).

⁵ *Sinclair v. Baggaley*, 4 M. & W. 312 (1833).

⁶ *Houlston v. Smyth*, 2 C. & P. 24 (1825).

they purport to bear date, it lies on the defendant to prove it; in the absence of all evidence to the contrary, I shall assume that they were written at the time they bear date."

In case VI. it was said: "All deeds and contracts ought regularly to be dated on the day of their execution. This is important for a great variety of purposes. The rights of the contracting parties are not unfrequently made to depend upon an accurate statement of time. Accordingly, it is found by experience, that in the prudent management of affairs this rule is commonly recognized as useful, and observed with care, and this being at once the usual and proper manner of conducting a transaction of this kind, it may well be considered reasonable and safe to conclude in any particular instance, where there is no other evidence upon the subject that any legal instrument by which property is conveyed, was completed on the day on which it bears date. The principle *omnia præsumuntur rite acta* is not confined merely to official proceedings or the doings of public bodies, but has been extended to acts of private individuals, expressly when they are of a formal character as writings under seal."

In case XII. it was said: "The question then is whether the date or the service of the writ is the commencement of the action. It has certainly been understood in Massachusetts, that the day of the date was the commencement of the action. It is *prima facie* evidence only, and admits of evidence to rebut the presumption arising from the date; but until rebutted, the presumption is to prevail that the true date appears, and that date is the commencement of the suit.

In case XIII. Lord Abinger said: "Those cases where it has been held that promissory notes signed by the bankrupt are not evidence sufficient to support the commission unless proved to have been in existence before the bankruptcy, stand on a peculiar foundation of their own, which distinguishes them from the present. In those cases it was the interest of the petitioning creditor to support the com-

mission, and owing to the jealousy which the law feels of a collision between him and the bankrupt, the practice has been established when no other evidence of a petitioning creditor's debt is offered than a paper in the handwriting of the bankrupt, to require proof of the existence of that document previous to the act of bankruptcy. But it has never yet been held, or even contended, that where a paper is adduced in evidence against a bankrupt or his assignee, the document itself is not *prima facie* evidence that it was made at the time it bears date; and I never yet knew an instance where the defendant was called upon to prove the actual date."

"Generally speaking," said Best, C. J., in case XIV., "a date is presumed to be correct. But where the letters of the wife are given in evidence in favor of the husband, you must prove when they were sent, because after a reconciliation, husband and wife might contrive letters.'

B.

I. It is necessary to prove that G. was in Baltimore on the 9th of November, 1829. A promissory note dated Baltimore, November 9, 1829, and signed by G., is produced. This does not raise a presumption that G. was in Baltimore on that day.¹

¹ Given v. Albert, 5 W. & S. 333 (1845).

CHAPTER V.

THE PRESUMPTION OF INNOCENCE IN CIVIL CASES.

RULE 19.—A person who is shown to have done any act is presumed to have done it innocently and honestly (A), and not fraudulently¹ (B), illegally² (C), or wickedly.³

Illustrations.

A.

I. A man and woman live and cohabit together. The presumption is that they are married.⁴

II. Marriages between white people and negroes are prohibited under a penalty. A negro and a white woman live together. The presumption is that they are not married.⁵

III. A husband and wife separate; the former goes and lives and cohabits with another woman. The presumption is that he has obtained a divorce.⁶

IV. A. marries B. having a husband, C., living. C. subsequently dies. A. and B. continue to cohabit. The presumption is that they have been married after C.'s death.⁷

¹ Thus, a party alleging fraud must prove it. *Gutzwiller v. Lackman*, 39 Mo. 91 (1866); *Blaisdell v. Cowell*, 14 Me. 370 (1837); *Inhabitants of New Portland v. Inhabitants of Kingsfield*, 55 Me. 173 (1867); *Reeves v. Dougherty*, 7 Yerg. 322 (1834); *Paxton v. Boyce*, 1 Tex. 317 (1846); *Ex parte Knowles*, 2 Oranch C. O. 576 (1825); *Cooper v. Galbraith*, 3 Wash. C. O. 546 (1819); *Hagar v. Thomson*, 1 Black, 80 (1861); *Greenwood v. Lowe*, 7 La. Ann. 197 (1852); *Hewlett v. Hewlett*, 4 Edw. Ch. 8 (1837); *Watkins v. Watkins*, 2 Atk. 97 (1740).

² *Cummings v. Stone*, 18 Mich. 70 (1864); *Gassett v. Godfrey*, 26 N. H. 415 (1853); *Farmers', etc., Bk. v. Detroit, etc., B. Co.*, 17 Wis. 573 (1863); *Howard v. Boorman*, 17 Wis. 459 (1863).

³ *Kenton County Ct. v. Bank Lick Turnpike Co.*, 10 Bush, 539 (1874); *Long v. State*, 46 Ind. 523 (1874); *Chapman v. McIlwraith*, 77 Mo. 44 (1883); *Cross v. Brown*, 41 N. H. 229 (1860); *Richards v. Kountze*, 4 Neb. 299 (1876); *Gay v. Bidwell*, 7 Mich. 519 (1859); *Habersham v. Hopkins*, 4 Strebb. (S. C.) 339 (1850); *Russell v. Baptist Theological Union*, 73 Ill. 337 (1874).

⁴ *Post v. Post*, 70 Ill. 484 (1873); *Cope v. Pearce*, 7 Gill, 263 (1848).

⁵ *Armstrong v. Hodges*, 2 B. Mon. 70 (1841).

⁶ *Blanchard v. Lambert*, 43 Iowa, 338 (1876).

⁷ *Blanchard v. Lambert*, 43 Iowa, 338 (1876); *Yates v. Houston*, 3 Tex. 433 (1848); *Carroll v. Carroll*, 20 Tex. 731 (1859); *Fenton v. Reed*, 4 Johns. 51; *Rose v. Clark*, 8 Page, 573; *Jackson v. Clark*, 18 Johns. 347.

V. A. being under the legal age, contracts a marriage with B.; the marriage is void. When A. comes of age, B. is on her death-bed and dies three weeks thereafter; during that time they continue to live together and to be recognized as husband and wife. A marriage will be presumed to have taken place after A. came of age.¹

VI. To sustain a plea of coverture, a defendant swore that she was married at a certain chapel on a certain day, and afterwards cohabited with her husband; the law required that to render a marriage valid, the chapel in which it was solemnized, should be licensed. *Held*, that the presumption was that the chapel in this case was duly licensed.²

VII. In an action by A. against B., A. alleged that B., who had chartered his ship, had put on board a dangerous commodity by which a loss happened, *without due notice to the captain*, or any other person employed in the navigation; the burden of proving that B. did not give the notice was on A.³

VIII. A railroad company is authorized to construct a railroad in a public street, with necessary switches and turn-outs; it makes certain switches which it is alleged are a nuisance. The presumption is that they are necessary, and the burden is on the one complaining of the nuisance.⁴

IX. A physician is employed to treat A.'s wife and children. In a suit for his services, it will be presumed that the visits, for which he charges, were necessary.⁵

X. A statute requires that the taking of the sacrament should be a prerequisite to holding a certain office. The presumption is that a person holding such office is qualified in this manner.⁶

XI. An insolvent exhibits an account of his debits and credits under oath. The presumption is that it is a true account, and not that he has committed perjury.⁷

XII. The action is for the malicious prosecution of the plaintiff without probable cause. The burden of proving the absence of probable cause is on the plaintiff.⁸

XIII. A statute provides that no justice of the peace shall hear any examination in any bar-room where spirituous liquors are sold. A justice holds an examination in a bar-room. It will not be presumed that spirituous liquors were sold there.⁹

¹ *Wilkinson v. Payne*, 4 T. R. 468 (1791).

² *Sichel v. Lambert*, 15 C. B. (N. S.) 781 (1864).

³ *Williams v. East India Co.*, 3 East, 104 (1802).

⁴ *Carson v. Central R. Co.*, 35 Cal. 325 (1888).

⁵ *Todd v. Myers*, 40 Cal. 355 (1870).

⁶ *King v. Hawkins*, 10 East, 211, (1809).

⁷ *Hewlett v. Hewlett*, 4 Edw. (N. Y.) 7 (1839).

⁸ *Lavender v. Hodgens*, 32 Ark. 764 (1878).

⁹ *Savner v. Chipman*, 1 Mich. 116 (1843).

XIV. Both parties to a suit testify to matters within the knowledge of both. Material evidence of one is not contradicted by the other. It is presumed to be true.¹

XV. The question is whether A. was divorced from B., A. having subsequently married C. A. testifies to a divorce proceeding, but the record having been destroyed, there is no evidence that the decree was ever recorded. The presumption is that it was.²

In case I., if the inference should be that they were not married, there must be an inference that they were living in unlawful relations. "The mere cohabitation of two persons of different sexes, or their behavior in other respects as husband and wife, always affords an inference of greater or less strength that a marriage has been solemnized between them. Their conduct being susceptible of two opposite explanations, we are bound to assume it to be moral rather than immoral."

In case II., the presumption is that the parties were not married, because if they were, they were guilty of violating the express words of a penal statute.

"We have here," said Keating, J., in case VI., "the fact of a religious ceremony having been performed by a minister of religion, in a place of public worship. All that is required to make the marriage a strictly valid marriage is that the place where the ceremony was performed was duly licensed under the statute for the celebration of marriages, and that the registrar was present. The question is whether we may presume the existence of these two requisites. I think we may, consistently with all the doctrines of legal presumptions, fairly presume that the ceremony was properly and legally performed, seeing that if it were otherwise the officiating clergyman would have been guilty of felony."

It was argued in case VII. that to compel A. to prove the want of notice was compelling him to prove a negative

¹ *Matthews v. Lanier*, 33 Ark. 91 (1878). A. swears that on a certain day he deposited some money with B. B. swears that he did not. The veracity of neither is impeached. The presumption of truth is in favor of A. *Hepburn v. Citizens Bank*, 2 La. Ann. 565 (1847).

² *Re Edwards*, 58 Iowa, 431 (1892).

which in a civil action at least was against the general rules of evidence. But Lord Ellenborough said: "That the declaration in imputing to the defendants the having wrongfully put on board a ship without notice to those concerned in the management of the ship, an article of a highly dangerous, combustible nature, imputes to the defendants a criminal negligence, can not well be questioned. In order to make the putting on board wrongful the defendants must be cognizant of the dangerous quality of the article put on board, and if being so, they yet gave no notice considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous article on board for which they are criminally liable and punishable as for a misdemeanor at least. We are, therefore, of opinion, upon principle and the authorities, that the burden of proving that the dangerous article in question was put on board without notice rested upon the plaintiff's alleging it to have been wrongfully put on board without notice of its nature and quality."

In case XV. it was said: "The next question is, has it been established that deceased and appellant were divorced in 1873. In considering this question we shall regard the case as triable anew in this court. The appellant testifies she never was served with notice of any such an action and that she had no knowledge of any such proceeding. What purports to be a copy of the bar docket for the April term, 1873, was introduced in evidence, and it fails to show there was such a cause pending at that term. One of the books being a record of the proceedings of the court, was not destroyed. No decree of divorce can be found therein. The first record, or entry, in this book was made in 1869, and the last in 1876, so that it covers the period when the divorce is claimed to have been obtained. Two decrees of divorce, between other parties, are set out at length in said book, as having been procured at the April term, 1873. The entries in the book are not in regular order. Judgments or

decrees rendered, for instance, in 1872, precede a judgment which was rendered in 1870. There was another record book which was destroyed by the fire. There was evidence tending to show the clerk made entries in both of these books during the period of the trial of the action for divorce. The evidence fails to show that any person ever saw the alleged decree or record thereof. On the other hand there is evidence which can not be ignored, that a petition was filed and that a decree of divorce was ordered by the court, and a sufficient memorandum made by the judge in his calendar to enable a decree to be drafted, or the clerk to make the appropriate entry of record that a divorce had been granted. It was the duty of the clerk, under the direction of the judge, to have made a record of all the judgments and decrees of the court which were made at the April term, 1873. It must be presumed, both the clerk and the judge did their duty. The appellant repeatedly, and to divers persons, after the divorce is claimed to have been obtained, admitted such to be the fact, and afterwards she married one Baker and cohabited with him as his wife in the same house at which the deceased boarded. It is insisted the admission of the appellant that there was a divorce should not be considered, because whether there was a divorce or not can only be shown by the record. Whether a decree of divorce was ever entered of record by the clerk we are not entirely satisfied. But that such a decree was ordered by the court and directed to be entered of record, we can not doubt. This being so, we think the admissions and acts, and conduct of the appellant, should be considered in aid of the presumption that a decree of divorce was in fact entered of record. That there was a divorce must be conceded, or the other result follows that the appellant was guilty of bigamy when she married Baker, and that the deceased so knew. In the absence of clear and satisfactory evidence to the contrary the presumption should be indulged that a divorce had been obtained, and the defendant lawfully contracted the marriage with Baker. The

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presumption of innocence rather than guilt should be indulged. The evidence is quite persuasive, if not entirely satisfactory, that there was a divorce. When to this then is added the presumption of innocence, and the acts and declarations of the appellant, we think the preponderance of the evidence is that the appellant and the deceased were duly and legally divorced."

B.

I. In an action at law the plaintiff reads to the jury a statement in the handwriting of the defendant. The presumption is that he obtained it fairly.¹

II. A person makes a deed of land. The presumption is that he was seized of the land at the time.²

III. R. gives to L. an order on J., his debtor, for a sum less than the debt; he also gives to F. an order on J. for the whole sum due from J. to L. F.'s order being lost, the question is which was given first. The presumption is that the order in favor of L. was.³

IV. A. seeks to rescind a sale of land made by B. to him, on the ground that B. had used fraudulent representations in making the sale. The burden is on A. to prove this, as the presumption is in B.'s favor.⁴

V. It was contended that a sale was fraudulent. The court instructed the jury that "it was necessary that the defendant should adduce stronger proof to establish fraud than to prove a debt or sale; that the presumption was that every man acted honestly and without fraud, and when fraud was alleged the proof must not only be sufficient to establish an innocent act, but to overcome the presumption of honesty." *Held*, proper.⁵

VI. An action is by B. for deceitfully exchanging property, upon which A., one of the parties, had an adverse claim at the time of the exchange. The burden is not on B. to show that he had no notice.⁶

VII. To remove the bar of the Statute of Limitations from a claim against a testator's estate the plaintiff proves a receipt of part payment,

¹ *Hazen v. Henry*, 6 Ark. 86 (1845). "The possession of the account by defendant raises the presumption not only that it was rendered, but that it came properly into his hands." *Nichols v. Alsop*, 10 Conn. 263 (1834).

² *Bolster v. Cushman*, 34 Me. 428 (1852).

³ *James River, etc., Co. v. Littlejohn*, 18 Gratt. 53 (1867); *Littlejohn v. Ferguson, Id.*

⁴ *Oaks v. Harrison*, 24 Iowa, 179 (1867); *Burton v. Mason*, 36 Iowa, 392 (1868); *Leighton v. Orr*, 44 Iowa, 680 (1876).

⁵ *Hatch v. Bayley*, 19 Cush. (Mass.) 37 (1855).

⁶ *Patee v. Pelton*, 48 Vt. 122 (1876); and see *Hibbard v. Mill*, 46 Vt. 243 (1873).

signed by him, which was found in the testator's room. The mere fact that the plaintiff was seen in that room alone would not justify the inference that he fraudulently placed his receipt among the testator's papers.¹

VIII. A mortgage is alleged fraudulent. The burden of showing this to be so is on the complainant.²

IX. A law allows an administrator commissions on the money in his hands except where he fails to make annual reports to the ordinary. In proceedings in which it was charged that an administrator was not entitled to money which he claimed as commissions, the burden of showing that he did not make the required returns is on the complainant; the presumption is that he did his duty.³

In case III. it was said: "In the absence of any evidence on the subject the presumption must be that L.'s order was given first. For it would have been an act of folly as well as a fraud in R. to give L. an order for the amount of his debt when he had already given F. an order for the whole balance due him from the company. The court will not presume this, in the absence of all evidence, but will presume the contrary."

In case IV. it was said: "To say the least it is left much in doubt whether defendant ever made the representations charged. The presumption is that the transaction was fair and honest, and, as plaintiff affirms the contrary, it is his duty to sustain his allegations by sufficient proof, by such evidence as will satisfy the conscience of the chancellor. When, upon all the facts, the case is left in equipoise, the party affirming must fail."

"It is certainly true," said Mr. Justice Story, delivering the judgment of the Supreme Court in another case,⁴ "that length of time is no bar to a trust clearly established, and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary it would seem that the length of time during which the fraud has been success-

¹ Carroll v. Quynn, 13 Md. 379 (1856).

² Price v. Gover, 40 Md. 102 (1874).

³ Gee v. Hicks, Rich. (S. C.) Eq. Cas. 5 (1831).

⁴ Prevost v. Grais, 6 Wheat. (U. S.) 481 (1821); 1 Pet. C. C. 364 (1816).

fully concealed and practiced is rather an aggravation of the offense and calls more loudly upon a court of equity to grant ample and decisive relief. But length of time necessarily obscures all human evidence, and as it thus removes from the parties all the immediate means to verify the value of the original transactions, it operates, by way of presumption, in favor of innocence and against imputation of fraud. It would be unreasonable after a great length of time to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be encumbered. The most that can fairly be expected in such cases, if the parties are living, from the frailty of memory and human infirmity, is that the material facts can be given with certainty to a common intent, and if the parties are dead and the cases rest in confidence and in parol agreements, the most that we can hope is to arrive at probable conjectures and to substitute general presumptions of law for exact knowledge. Fraud or breach of trust ought not lightly to be imputed to the living, for the legal presumption is the other way, and as to the dead who are not here to answer for themselves it would be the height of injustice and cruelty to disturb their ashes and violate the sanctity of the grave unless the evidence of fraud be clear beyond a reasonable doubt."

But fraud may be inferred from circumstances. In *Morford v. Peck*,¹ the court say: "The last point which we propose to discuss is contained in the first proposition of the charge to the jury, who were told that the plaintiffs must prove the fraud, and that it could not be inferred. The court probably intended by this merely to convey to the jury the idea embodied in the maxim so often quoted, that 'the law never presumes fraud.' The maxim itself is liable to mislead a jury, and requires explanation to the effect that the law in its charitable estimate of human

nature, never supposes a person guilty of a thing so base until it is proved; but it must never be taken to mean that the law will not imply fraud from facts and circumstances where it is not directly proved, or will not in some cases even find constructive fraud where no actual fraud is proved. The above maxim embodies a principle similar to that which obtains in criminal cases, that the law presumes every one innocent until proved guilty; but it would hardly do to say that guilt can never be inferred, for in most criminal cases, especially of a felonious character, the conclusion of guilt must be arrived at, if at all, by the aid of indirect evidence, by inference from other facts and circumstances. We think the judge made the maxim more misleading by substituting "inferred" for "presumed." The former is a stronger word than the latter (in connection with the words "can not"), for the purpose of excluding indirect evidence. To infer is derived from the Latin *inferre*, compounded of "*in*," from, and "*ferre*" to carry or bring, and its strict meaning is to bring a result or conclusion from something back of it, that is, from some evidence or *data* from which it may be legally deduced. But "to presume" is from the Latin *procsumere*, consisting of "*proc*," before and "*sumere*," to take, and signifies to take or assume a matter beforehand, without proof — to take for granted. We do not suppose jurors would weigh these words in the light of such a verbal criticism, but we know of no better way to illustrate the substantial difference in the impression which these two words are calculated to make on the common mind. We think this first proposition, standing by itself, was calculated to mislead the jury."

C.

I. It is alleged that certain goods were sold contrary to law. The burden of proving that the sale was in violation of law is on the party alleging it.¹

¹ *Trott v. Irish*, 1 Allen, 461 (1861); *Hewes v. Platts*, 12 Gray, 143 (1868); *Stebbins v. Leowolf*, 1 Cush. 137 (1849); *Kidder v. Norris*, 18 N. H. 532 (1847).

II. A statute allows ten per cent interest to be reserved only in the case of money loaned. A contract provides for the payment of ten per cent interest without showing the consideration. The presumption is that it was money loaned.¹

III. The question is whether A. has committed a certain act. The doing of the act renders A. liable to a penalty. That A. has done an act involving a penalty will not be presumed.²

IV. A. sues B. for his services as B.'s bar-keeper. There is no proof whether B. is a legal seller of liquor, *i.e.*, has a license. The presumption is that he has.³

V. A. is sued for destroying certain dwelling houses. In mitigation of damages he offers to prove that the houses were houses of ill-fame and could not have been rented for any other purpose—honest people would not live in them. The evidence is inadmissible; for the law can not presume that future tenants will violate the law.⁴

So it is a general rule that negligence will not be presumed without some evidence showing a state of affairs from which negligence can properly be inferred.⁵ Thus it is shown simply that a vessel took fire. Here no presumption arises that the fire was the result of any negligence.⁶ So seaworthiness in a vessel is presumed.⁷ But if she is lost without stress of weather or without sustaining damages from danger of the seas, unseaworthiness is presumed.⁸ In like manner the happening of a catastrophe which might have been prevented raises a presumption of negligence. A boiler for example explodes. The presumption is that it was negligently made or used.⁹ Or a blast

¹ *Sutphen v. Cushman*, 35 Ill. 187 (1864).

² *Sidney v. Sidney*, 3 P. Wms. 270 (1734); *Clark v. Periam*, 3 P. Wms. 334 (1741); *Scholes v. Hilton*, 10 M. & W. 15 (1842).

³ *Timson v. Moulton*, 3 Cush. 269 (1849).

⁴ *Johnson v. Farwell*, 7 Me. 370 (1831).

⁵ *Lindsay v. Connecticut, etc.*, R. Co., 27 Vt. 643 (1854).

⁶ *The Buckeye*, 7 Biss. 23 (1863).

⁷ *Martin v. Fishing Ins. Co.*, 20 Pick. 329; 33 Am. Dec. 220; *Lunt v. Boston Marine Ins. Co.*, 6 Fed. Rep. 563; *Werk v. Leathers*, 1 Woods, 272.

⁸ *Sneathen v. Memphis Ins. Co.*, 3 La. Ann. 474; 48 Am. Dec. 462 (1848); *Patrick v. Hallett*, 1 Johns. 246; *Talcot v. Commercial Ins. Co.*, 2 Johns. 129; *Miller v. Ins. Co.*, 2 McCord. (S.C.) 326; 13 Am. Dec. 734 (1833); *Dupeyre v. Western Ins. Co.*, 2 Rob. (La.) 457; 38 Am. Dec. 465 (1848); *Prescott v. Union Ins. Co.*, 1 Whart. (Pa.) 399; 30 Am. Dec. 206 (1836). That a carrier received goods in good order is presumed. *Breed v. Mitchell*, 48 Ga. 533 (1873).

⁹ *Illinois Cent. R. Co. v. Phillips*, 49 Ill. 234; *Illinois Cent. R. Co. v. Houck*, 73 Ill. 225 (1874).

explosion injures a horse. The presumption is that it (the blast) was not properly covered.¹ Or an animal is killed by a railroad locomotive on the track. The presumption is that it was negligently killed.² As said by the Supreme Court of Georgia: "We incline to think that the mere fact that the company's train killed the cows was sufficient to raise the presumption that the killing was the result of negligence in the company's servants. When one man kills another the law implies malice in the killer; so if one man kills another's cattle ought there not, in like manner, to be an implication of malice or negligence in the latter."³

¹ *Ulrich v. McCabe*, 1 Hilt. 251 (1856).

² *Little Rock, etc., R. Co. v. Finley*, 37 Ark. 563 (1881); *Little Rock, etc., R. Co. v. Henson*, 38 Ark. 415 (1892).

³ *Georgia R. Co. v. Willis*, 28 Ga. 317 (1859); *Georgia R. Co. v. Monroe*, 49 Ga. 373 (1873).

CHAPTER VI.

THE PRESUMPTIONS OF MARRIAGE AND LEGITIMACY.

RULE 20. — Marriage (A) or filiation (parentage) (B) may be presumed.

A.

In *Cargile v. Wood*,¹ it is said: "Where parties have cohabited together and held themselves out as man and wife, and there are circumstances from which a present contract may be inferred, the law, out of charity and in favor of innocence and good morals, will presume matrimony. The law in general presumes against vice and immorality, and on this ground holds acknowledgment, cohabitation, and reputation presumptive evidence of marriage. Mere cohabitation is not usually considered sufficient. Bishop lays down the doctrine that 'cohabitation and the reputation of being husband and wife are usually considered together in questions concerning the proof of marriage, the one being in a certain sense the shadow of the other. Some of the authorities favor the idea that reputation of itself may be received as sufficient proof *prima facie*, but it must be uniform and general; and if there is a conflict in the repute, it will not establish the marriage. On the other hand, its sufficiency in any case has been denied, unless there be accompanying proof of cohabitation.'² Cohabitation and reputation are at best only presumptive proofs, and when one of these foundations is withdrawn, what remains is too weak to build a presumption on. There is

¹ 63 Mo. 56, (1876), and see *Johnson v. Johnson*, 1 Dessau. 595 (1797).

² 1 Bish. Mar. and Div. (5th ed.), sec. 438.

good sense in the Scotch law, by which cohabitation alone is considered insufficient, and which requires in addition habit and repute, because it is said the parties may eat, live, and sleep together as mistress and keeper without any intention of entering into marriage. Cohabitation is simply the first step, and when that is accompanied by an acknowledgment of the matrimonial relations, and treating each other as a man and wife and holding one another out to the world as such, there may reasonably be a presumption founded upon all these facts that the intercourse is lawful instead of meretricious. These things all go to form the circumstances upon which reputation is grounded. Reputation consists of the belief and the speech of the people who have an opportunity to know the parties, and have heard and observed their manner of living. But cohabitation may be notoriously illicit, and known to be so in the neighborhood in which the parties reside. In such a case the law would surely not presume that it furnished any presumption or evidence of marriage. The reputation of the parties and mode of life, founded on facts, would repel it, and a presumption in their favor would assert what is well known to be a falsehood. Therefore, cohabitation and reputation must both exist before the presumption can be raised. If parties cohabit together as man and wife, treat each other as such, and acknowledge the existence of that relation, and thereby acquire the reputation of being married among the people, the fact of marriage may well be presumed. But if the facts show the contrary, and the reputation is that they are not married, no such presumption can be indulged. The court therefore declared the law correctly, when it required reputation as well as cohabitation."

B.

Filiation or parentage may at law be established, and can only in general be so established, as regards the father, by

a combination of facts indicating the connection of parent and child between an individual and the family to which he claims to belong. Among the principal of these facts are that his mother was married to the person whom he claims as his father at the time he was born or begotten; that he has always borne his name and been treated and maintained and educated as his child; that he has been uniformly received as such in society, and that he has been acknowledged as such by the family. These things being shown his legitimacy is presumed.¹

Sub-Rule 1. — *The law presumes the validity of a marriage ceremony*² (A), *and that every person is legitimate* (B).

Illustrations

A.

I. Parties appear at a church and the minister publicly and in the presence of others performs a ceremony of marriage between them, and they afterwards regard themselves as married. The presumption is that the ceremony was legal and regular, though there is no proof of the particulars of the ceremony or that it was according to the forms and usages of the church.³

II. On a question of legitimacy, a sentence of nullity of a marriage on account of the refusal of the woman's father to consent is produced. There is a statement in a parish register that a marriage took place with the consent of her mother; but saying nothing about the father.

¹ *Weatherford v. Weatherford*, 20 Ala. 548 (1852); *Illinois Loan Co. v. Bonner*, 75 Ill. 315 (1864); *Barnum v. Barnum*, 43 Md. 253 (1875). In *Blackburn v. Crawford*, 3 Wall. 175 (1865), the court instructed the jury that if a man and woman live together as husband and wife, and the man acknowledges the woman as his wife, and always treats her as such, and acknowledges and treats the children which she bears to him as his children, and permits them to be called by his name, there is a presumption of law that they are legitimate. On appeal this was held incorrect. "Undersuch circumstances," said Mr. Justice Swayne, "the law makes no presumption. The question to be determined was one of fact and not of law. The facts referred to were a part of the evidence. They were to be weighed against the countervailing evidence. They might by possibility all be true, and yet no marriage have occurred, and the children all be illegitimate."

² *Harrod v. Harrod*, 1 K. & J. 4 (1854); *Fleming v. Fleming*, 4 Bing. 306 (1827); *Sichel v. Lambert*, 15 O. B. (N. S.) 782 (1864).

³ *People v. Calder*, 30 Mich. 85 (1874); *Fleming v. People*, 27 N. Y. 329, and see *State v. Kean*, 10 N. H. 347 (1839).

The presumption in connection with other circumstances, is that the marriage was legal.¹

In case II. it was said: "I think that having regard to the general rule which applies to all cases of presumption, *omnia rite acta præsumuntur*, and to the particular force of the rule as applied to cases of presumption in favor of marriage and legitimacy, and against the commission of any crime or offense; and having regard also to the cases which were cited in the argument, we are bound in this case to presume that the father was consenting to the marriage, and that it was therefore valid. The circumstance of the marriage being expressed on the face of the register to be with the consent of the mother, was relied on against the presumption, but I think it more than probable that the mother's consent was entered upon the register in consequence of her having been present at the marriage, and at all events the fact of her consent having been given would not, I think, be sufficient to countervail the presumption that the father was consenting also."

B.

I. A., claiming as the heir of B., seeks to recover from C. property of B. It is proved that A. is B.'s child. The burden is on C. to show that he is not the legitimate child of B.

The law presumes that every child in a Christian country is *prima facie* the offspring of a lawful rather than of a meretricious union of the parents, and that consequently the mother, either by actual marriage, or by cohabitation and recognition, was the lawful wife of the father, and in the absence of any negative evidence, no supplemental proof of legal marriage will be necessary to legitimize the offspring.²

¹ *Harrison v. Mayor*, 4 DeG. M. & G. 153 (1853).

² *Strode v. Magowan*, 2 Bush, 627 (1865). And where a man speaks of a child of his as his "daughter," the presumption is that she is legitimate. *Gaines v. New Orleans*, 6 Wall. 690 (1867). And see *Gaines v. Herman*, 24 How. 553 (1860).

RULE 21. — A person proved to have been born during the continuance of a valid marriage between his mother and any man, or within such time after the dissolution thereof and before the celebration of another valid marriage, that his mother's husband could, according to the course of nature, have been his father, is presumed to be the legitimate child of his mother's husband.¹

Illustration.

I. A woman was divorced from her husband July 11, 1865. On March 7, 1866, she gave birth to a child. The presumption is that the former husband was the father.²

In accordance with the maxim *pater est quem nuptiae demonstrat* the rule is the same where the child is born in wedlock, whether begotten before or after the marriage;³ and where the mother is visibly pregnant at the time of the marriage the presumption is held not to be rebuttable, for it is said that a man who marries a woman whom he knows to be in that condition is to be considered as acknowledging by a most solemn act that the child is his.⁴ As has been said: "This legal presumption that he is the father whom the nuptials show to be so, is the foundation of every man's birth and *status*. It is a plain and sensible maxim which is

¹ Steph. Ev., art. 98; *Stegall v. Stegall*, 2 Brock. 266 (1895); *Illinois Loan Co. v. Bonner*, 75 Ill. 315 (1874); *Herring v. Goodson*, 43 Miss. 392 (1870); *Remington v. Lewis*, 8 B. Mon. 611 (1848); *State v. Worthingham*, 23 Minn. 528 (1877); *Bowles v. Bingham*, 3 Munf. 599 (1811); *Patterson v. Gaines*, 6 How. 550 (1848); *Caugolle v. Ferrie*, 23 N. Y. 90 (1861); *Senser v. Bower*, 1 Penn. 450 (1890); *Dinkins v. Samuels*, 10 Rich. (L.) 70 (1866).

² *Drennan v. Douglass*, 102 Ill. 345 (1892). And see *State v. Romaine*, 58 Iowa, 46 (1892). That the child was born eight months after the marriage does not overcome the presumption. *Phillips v. Allen*, 3 Allen, 453 (1861).

³ *Dennison v. Page*, 29 Pa. St. 429 (1857). See dissenting of opinion of Lowrie, J., in *Page v. Dennison*, 1 Grant's Cas. 379 (1859); *R. v. Luff*, 8 East. 198; *State v. Herman*, 13 Ired. (L.) 503 (1853); *State v. Wilson*, 10 Ired. (L.) 131; *Montgomery v. Montgomery*, 3 Barb. Ch. 132 (1848); *Bowles v. Bingham*, 2 Munf. 443 (1811); 3 Munf., *appendix*. In *Montgomery v. Montgomery*, 3 Barb. Ch. 132 (1848), it was held that the admission of a third party that a child born after the marriage, but begotten before, was his child and not that of the subsequent husband was not sufficient to rebut the presumption.

⁴ *R. v. Luff*, 8 East, 198; *State v. Herman*, 13 Ired. (L.) 503 (1853).

the corner stone, the very foundation on which rests the whole fabric of human society; and if you allow it once to be shaken, there is no saying what consequence may follow.”¹ By the ancient common law, if the husband was within the four seas at any time during the pregnancy of the wife, the presumption was conclusive that her children were legitimate.² This conclusive presumption of legitimacy was upheld, it has been intimated, from motives of policy to protect the fruits of the profligacy of kings and nobles from the peril of disinheritance. So far was the principle carried that in one case it was decided that a child born in England was legitimate, although the proof was uncontradicted that the husband resided in Ireland during the whole time of the wife’s pregnancy and for a long time previous; while in another, where the husband resided in Cadiz, the child was held to be a bastard, not because Cadiz was further away from the residence of the wife, but because Ireland was within the “four seas,” while Cadiz was without them. Nevertheless, the English judges, during many reigns, adhered to the rule in all its strictness and refused — except in the case of a natural impossibility — to make any inquiries into the paternity of a child whose mother’s husband was within the realm.³ But this rule at length, “on account of its absolute nonsense,” as Mr. Justice Gross termed it, was exploded. In 1807. in the case of *King*

¹ *Routledge v. Carruthers*, Nicholas Adul. Bast. 161.

² *R. v. Murray*, 1 Salk. 122; *R. v. Allerton*, 1 Ld. Ray. 122.

³ In *Flettesham v. Julian*, Year Book, 7 Hen. IV. 9, decided in the seventh year of the reign of Henry IV., Rickhill, J., said: “Cestui John fuit deins la mere l’issue fuit mulier — for who that bulleth my cow the calf is mine.” The judicial language of that day was apt to be broad, but the judge was to furnish the great dramatist with law for one of his tragedies: —

“Sirrah, your brother is legitimate,
Your father’s wife did after wedlock bear him;
And if she did play false the fault was hers,
Which fault lies on the hazards of all husbands
That marry wives. Tell me, how if my brother
Who, as you say, took pains to get this son
Had of your father claimed this son for his?
In sooth, good friend, your father might have kept
This calf, bred from his cow, from all the world.”

King John, Act I., Scene I.

v. *Luffe*,¹ Lord Ellenborough laid it down that the illegitimacy of the child might be shown where the legitimacy was impossible, in the five cases: (1.) Where the impossibility arose from the husband being under the age of puberty. In a case in the Year Books it was held that the issue was a bastard where the husband was under fourteen years of age at the time. (2.) Where the impossibility arose from the husband laboring under a disability occasioned by natural infirmity. In *Foxcraft's Case*² an infirm bedridden man was married in that state twelve weeks before his wife bore a child. The child was adjudged illegitimate. (3.) Where the impossibility arose from the length of time elapsed since the death of the husband. (4.) Where the impossibility arose from the absence of the husband — as where he was outside the realm at the time the child was begotten.³ (5.) Where the impossibility was based on the laws of nature. An example of this division is found in *Whisterlo's case*,⁴ where it was attempted to charge a black man as the father of a white child borne of a mulatto woman. But in an Illinois case, where a person's mother was an Indian, his father being white, proof that he was a colored man was held not to overcome the presumption of legitimacy, for the color would be inferred as being derived from the mother.⁵ Finally, in *Pendrell v. Pendrell*,⁶ it was held that it was not necessary to show that the legitimacy was impossible. In this case the husband and wife, after living together some months, separated, she staying in London and he going to Staffordshire. After a separation of three years a child was born. The evidence being strong that the husband had not visited the wife during that time, the presumption of the legitimacy of the child was held to be overthrown, and he was declared illegitimate.⁷

¹ 8 East, 307.

² 1 Roll. Abr.

³ See *R. v. Allerton*, 1 Ld. Ray. 395.

⁴ Cited in *Cross v. Cross*, 3 Paige Ch. 139.

⁵ *Illinois Loan Co. v. Bonner*, 75 Ill. 315 (1874).

⁶ 2 Strange, 925.

⁷ And see *Goodright v. Saul*, 4 Term Rep. 258.

In *Hargrave v. Hargrave*,¹ Lord Langdale laid it down that the presumption that a child born of a married woman is legitimate may be rebutted by showing that the husband was: (1) Incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must in the course of nature have been begotten; (4) only present under circumstances affording clear and satisfactory proof that there was no sexual intercourse. And in answer to the House of Lords the judges laid down the rule thus: Where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until the presumption is encountered by such evidence as proves to the satisfaction of those who are to decide the question that such sexual intercourse did not take place at any time when by such intercourse the husband could, according to the laws of nature, be the father of the child.²

In *Head v. Head*,³ Leach, V. C., summed up the modern English law in concise language. Said he: "The ancient policy of the law of England remains unaltered. A child born of a married woman is to be presumed to be the child of the husband, unless there is evidence which excludes all doubt that the husband could not be the father. But in modern times the rule of evidence has varied. Formerly it was considered that all doubt could not be excluded unless the husband were *extra quatuor maria*. But as it is obvious that all doubt may be excluded from other circumstances, although the husband be within the four seas, the modern practice permits the introduction of every species of legal evidence tending to the same conclusion. But still the evidence must be of a character

¹ 9 Beav. 225 (1846).

² Answer of the judges to the seventh question in the Banbury Peerage, 1 Sim. & Stu. 157 (1811).

³ 1 Sim. & Stu. 150 (1823).

to exclude all doubt; and when the judges in the *Banbury Case* spoke of satisfactory evidence upon this subject they must be understood to have meant such evidence as would be satisfactory, having regard to the special nature of the subject." This is the law of both England and the United States at the present time.

In answer to another question in the *Banbury Case*, the judges replied: "That after proof given of access of the husband and wife by which, according to the laws of nature, he might be the father of a child, no evidence can be received except to deny that such intercourse had taken place."¹ In this rule it should be remembered that "access" and "non-access" mean the existence or non-existence of opportunities for sexual intercourse.²

"If sexual intercourse is proved," said the chancellor in *Morris v. Davis*,³ "that is, if the judge or the jury trying the question of fact be satisfied that sexual intercourse took place between the husband and wife at the time of the child being conceived, the law will not permit an inquiry whether the husband or some other man was more likely to be the father of the child." If once you are satisfied that the husband had sexual intercourse with his wife, the presumption of legitimacy is not to be rebutted by its being shown that other men also had sexual intercourse with the woman. The law will not, under such circumstances, allow a balance of the evidence as to who

¹ Answer of the judges to the sixth question in the *Banbury Peerage*, 1 Sim. & Sta. 157 (1811); *Wright v. Holdgate*, 3 C. & K. 158 (1850).

² *Banbury Peerage*, 1 Sim. & Sta. 159 (1811). Said Lord Eldon in the *Banbury Peerage* (see 5 Cl. & F. 250): "Lord Hale, in *Hospeil v. Collins*, decided that the issue for the jury was as to the fact of access, or, as I understand him to mean, sexual intercourse. For the access in question is of a peculiar nature, not being access in the ordinary acceptation of the word, but access between a husband and wife viewed with reference to the result, namely, the procreation of children." "By 'access' I mean opportunities of having sexual intercourse." Alderson, B., in *Cope v. Cope*, 1 M. & Rob. 275 (1833). "Access is such access as affords an opportunity of sexual intercourse." *Bury v. Philpot*, 2 Myl. & K. 349 (1835). Lord Langdale in one case calls it "generating access," saying: "The absence of sexual intercourse where there has been some society, intercourse or access, has been called 'non-generating access.'" *Hargrave v. Hargrave*, 9 Beav. 225 (1846).

³ 5 Cl. & F. 243 (1837).

is most likely to have been the father.¹ The law does not permit the admission of evidence on the question whether the adulterer or the husband is most likely to be the father of the child.² So, where the husband has had intercourse or even "access," the bad reputation of the wife, either before or after the marriage, does not overthrow the presumption.³ Neither is the fact that the wife was living in adultery.⁴ In *B. v. Inhabitants of Mansfield*,⁵ it appeared that a wife was deserted by her husband, who went to live with another woman; that the wife at the end of three or four years married another man and had two children; that eleven years after the second marriage she again cohabited with her husband. It not appearing where the husband was between the time of his deserting and returning to his wife, it was held that the evidence was insufficient to show non-access when the children were begotten. "The question is," said Lord Denman, "whether in this case there be any evidence of illegitimacy, and to establish that it is necessary to show non-access of the husband. That may be proved by circumstances, one of which certainly is an adulterous intercourse between the husband or wife and another party. But here the whole proof consists only of that fact. We are not told what the husband was doing or where residing at the time the children were begotten." In *Berry v. Philpot*,⁶ the wife of P. left him and went to live with her father. Shortly after, her father dying, she formed a connection with one H., with whom she went to live. P. took a house opposite where they resided and had frequent interviews with her. She had two children during this time. It was held that they must be declared legitimate. "Access," said the master, "if it is such access

¹ Alderson, B., in *Cope v. Cope*, 1 M. & Rob. 375 (1833).

² *Hemmenway v. Townner*, 1 Allen, 209 (1861).

³ *Phillips v. Allen*, 3 Allen, 456 (1861).

⁴ *Cases ante*, and *Cross v. Cross*, 3 Paige Ch. 129; 23 Am. Dec. 778 (1832).

⁵ 1 Q. B. 444 (1841).

⁶ 3 Myl. & K. 349 (1834).

as affords an opportunity of sexual intercourse, and where the fact of such access between a husband and wife within a period capable of raising the legal inference as to the legitimacy of an after born child is not disputed, probabilities can have no weight, and a case ought never to be sent to a jury. There is nothing against the evidence of access except evidence of the adulterous intercourse of the wife with H., which does not affect the legal inference; for if it were proved that she slept every night with her paramour from the period of her separation from her husband, I must still declare the children to be legitimate. The interest of the public depends upon a strict adherence to the rule of law." In *Van Aernam v. Van Aernam*,¹ the wife of the plaintiff was for several years living in the same town with him as the kept mistress of another person, the husband making no exertions to break up the intercourse. The court held that in the absence of evidence of non-access the husband would be presumed to be the father of the children begotten upon the wife during that time.

From proof of "access" — as this word is used in this connection — the presumption of sexual intercourse is very strong. *Plowes v. Berry*,² affords a good illustration of this. In that case B., who was married in 1829 became a lunatic in 1833 and was confined in a lunatic asylum until his death. His wife who lived twenty-five miles away, occasionally visited her husband, but the keepers of the asylum had strict orders not to allow them at any time to remain alone together. He was allowed the freedom of the grounds, and the porter sometimes being absent it was possible for a person to enter without being seen. In March, 1835, she visited the asylum, remaining alone for some time with her husband. A child was born in December, 1835. There were rumors at the time that Mrs. B. was living in adultery

¹ 1 Barb. Ch. 378 (1846).

² 21 L. J. (Ch.) 680 (1862).

with one D. But the court held that the child was legitimate.¹

Evidence of rumor that a person was illegitimate is itself insufficient;² though such testimony is admissible in connection with other facts.³ In *King v. Luffe*,⁴ it was held that non-access of the husband need not be proved during the whole period of the wife's pregnancy — it was sufficient if it was naturally impossible (as where he had access only a fortnight before the birth) that he could be the father.

That husband and wife slept together affords a strong and irresistible inference of sexual intercourse.⁵ “But in the absence of such irresistible evidence, the fact of sexual intercourse must be tried like every other fact to which no direct evidence is applicable. Proof that the husband and wife were living in the same town, and so had opportunities of meeting, and, therefore, of sexual intercourse, would in the absence of any proof raising a presumption to the contrary be sufficient to establish the legitimacy of a child born of the wife.” Proof that they had been in the same room or in the same house together would be much stronger evidence of the fact, the strength of which, however, would vary with the circumstances; and as neither would be direct proof of sexual intercourse, but of facts from which, taken by themselves, sexual intercourse would be inferred, such inference must, as in all other cases, be capable of being repelled by the proof of facts tending to raise a contrary inference.⁶

But proof of access is not conclusive.⁷ It being only proved that the opportunity for sexual intercourse had

¹ See the corrected report of the case in 33 L. J. (Ch.) 347; and see *contra* *Clarke v. Mavnard*, 1 Madd. & Geld. 364 (1822).

² *Vaughn v. Rhodes*, 2 McCord, 227; 73 Am. Dec. 713 (1822).

³ *Stegall v. Stegall, ante*.

⁴ 8 East.

⁵ *Legge v. Edmonds*, 25 L. J. (Ch.) 125 (1856).

⁶ *Morris v. Davis, supra*.

⁷ *R. v. Inhabitants of Mansfield*, 1 Q. B. 444 (1814); *Cope v. Cope*, 1 M. & Rob. 275 (1833); *R. v. Shepherd*, 6 Binney, 283 (1841).

existed — as that the parties lived in the same house — and the fact itself not being proved, evidence is admissible to disprove the presumption that it did take place. “The parties may be followed with these four walls, and the fact of sexual intercourse not only disproved by direct testimony, but by circumstantial evidence raising a strong presumption against the fact.” To state this principle briefly — the proof of sexual intercourse being conclusive, the presumption can not be attacked, but the evidence by which such fact is to be established may be contradicted. The law is not so unreasonable as to demand proof of non-access by witnesses, who were with her every minute of the time whenever she is supposed to have been begotten with a child. If such facts and circumstances are proved, as would induce a rational and well founded belief that the husband could have no access, it is sufficient.¹

On this question the conduct of the supposed father or of the mother towards the child is relevant.² In the case of *Morris v. Davies*,³ the wife concealed the birth of the child from her husband, and declared to him that she never had such a child; the husband disclaimed all knowledge of it, and acted up to his death as if no such child was in existence; the wife’s paramour aided in concealing the child, reared and educated it as his own, and left it all his property by will. This repelled the presumption that the child was legitimate.

In the *Banbury Peerage Case*, Lord Redesdale said: “I admit that the law presumes the child of the wife of A., born when A. might have had sexual intercourse with her, or in due time after, to be the legitimate child of A.; but this was merely considered a ground of presumption, and might be met by opposing circumstances. The fact, indeed, that any child is the child of any man is not capable of

¹ *Com. v. Wentz*, 1 Ashm. 269 (1808); *Wright v. Hicks*, 13 Ga. 155 (1852); *State v. Pettaway*, 3 Hawks, 633 (1825).

² *Cope v. Cope*, 1 M. & Rob. 275 (1833).

³ 5 Cl. & F. 163 (1836).

direct proof, and can only be the result of presumption, understanding by presumption a probable consequence drawn from facts, either certain or proved by credible testimony, by which may be determined the proof of a fact alleged, but of which there can be no direct proof. * * *

It is, therefore, of high importance to consider in a question of legitimacy whether the fact of such acknowledgment as would demonstrate the legitimacy did take place; or whether by circumstances such acknowledgment was rendered impossible, as by the child being a posthumous child. If, on the contrary, it appears that the supposed father was ignorant of the birth of such a child, and that the fact of its birth was concealed from him, such concealment is strong presumptive proof that there had existed no sexual intercourse which could have made him the father of such a child."

So, the fact of the wife living in open adultery, coupled with the facts that the husband had only on one single occasion an opportunity for access, and that the wife concealed the birth of the child from her husband, were held sufficient to rebut the presumption of intercourse.¹ And the illegitimacy of a child of a married woman is established beyond dispute when it is shown that she was living in adultery at the time it was begotten, and that her husband was residing in a part of the country which made access impossible.²

The presumption still holds where the parties are living apart from each other by mutual consent;³ but it is otherwise where they are separated by a decree of the court, for in such case the presumption is that they obey the decree.⁴ But the presumption, in the first case, is of course rebuttable by proof of non-access.

¹ *Cope v. Cope*, 1 M. & Rob. 375 (1833). The report of this case in 5 C. & P. 604, is incorrect and misleading. See 1 Q. B. 450, Lord Denman, C. J.

² *The Barony of Sale*, 1 H. L. Cas. 507 (1848); and see *Gurney v. Gurney*, 33 L. J. (Ch.) 456 (1863).

³ *St. George v. St. Margarets*, 1 Salk. 123; *Sidney v. Sidney*, 3 P. Wms. 275 (1834); *Morris v. Davies*, 5 Cl. & F. 163 (1857); *Hemminway v. Towner*, 1 Allen, 209 (1861).

Id.

Neither the declarations of the wife, nor her testimony that the child was the child of a man other than her husband, are admissible;¹ nor of the wife that the husband had not access or opportunities for access;² nor of the husband that he was not the father of the child,³ or had not access or opportunities for access.⁴ And this rule is not altered by the modern legislation permitting parties to "testify in their own behalf."⁵ But where non-access has been established, the declaration of the wife is admissible to prove the paternity of the child.⁶ And on an indictment for bastardy or fornication, the wife is a competent witness to prove the connection.⁷ But, although it is no longer necessary that the legitimacy of the child must be shown to be impossible, nevertheless, the presumption can only be rebutted by proof beyond a reasonable doubt that the husband could not have been the father.⁸ The *onus* lies on the person alleging that the child of a married woman is illegitimate to prove it. There is no *onus* on the party whose legitimacy is in question to show opportunities of access, or what the circumstances were under which the access took place.⁹

In a Louisiana case¹⁰ it was held that the legitimacy of a child born in wedlock can not be contested by either the mother, her heirs, or the child himself. The right in such

¹ *Stegall v. Stegall*, 2 Brock. 257 (1835); *Pendrell v. Pendrell*, 2 Strange, 925 (1790); *Cope v. Cope*, 1 M. & Rob. 375 (1833); *Atchley v. Sprigg*, 33 L. J. (Ch.) 345 (1864); *Stevens v. Moss*, 2 Cowp. 594; *Dennison v. Page*, 29 Pa. St. 420 (1856); *Com. v. Shepherd*, 6 Binney, 283.

² *Com. v. Shepherd*, 6 Binney, 283 (1814).

³ *Id.*; *Hemminway v. Towner*, 1 Allen, 309 (1861).

⁴ *Wright v. Holdgate*, 3 Cook, 155 (1850); *King v. Inhabitants of Somton*, 5 Ad. & Ell. 180 (1836).

⁵ *Boykin v. Boykin*, 70 N. C. 262 (1874).

⁶ *Legge v. Edwards*, 25 L. J. Ch. 125 (1855).

⁷ *Com. v. Wents*, 1 Ashm. 269 (1808); *State v. Pettaway*, 3 Hawks, 673 (1825); *Com. v. Stricker*, 1 Browne, XLVIII (1801); *Whitman v. State*, 34 Ind. 312 (1870); *Com. v. Shepherd*, 6 Binney, 213 (1841).

⁸ *Phillips v. Allen*, 2 Allen, 453 (1861); *Flowers v. Bossey*, 31 L. J. (Ch.) 680 (1863); *Atchley v. Sprigg*, 33 L. J. (Ch.) 345 (1864); *Van Aernam v. Van Aernam*, 1 Barb. Ch. 375 (1846); *Sullivan v. Kelly*, 3 Allen, 148 (1861).

⁹ *Flowers v. Bossey*, 13 L. J. (Ch.) 680 (1833).

¹⁰ *Eloi v. Mader*, 1 Rob. 581; 38 Am. Dec. 192 (1841).

a contest abides only with the putative father. Said Murphy, J.: "The declarations of the plaintiff himself cannot affect his condition, and are not to be listened to. It would be *contra bonos mores* to allow him to repudiate his own legitimacy. Having been born in marriage, he can not be permitted by any admission to bastardize himself. * * * The right to disavow and repudiate a child born under the protection of the legal presumption *pater est*, etc., is peculiar to the father, and can be exercised only by him or his heirs, within a given time and in certain cases. If the father renounces the right, expressly or tacitly, it is extinguished and can never more be exercised by any one. The mother has no right to disavow a child, because maternity is never uncertain; she can only contest the identity of the child. The right to disavow is entirely distinct and different from that which all parties whose interests may be affected have to contest the legitimacy of one in whose favor the legal presumption does not exist."

In an old case, where a man was divorced from his wife on the ground of his impotence, and then married another woman who had issue during the marriage, the issue were held to be his, on the ground, it was said, that a man may be *habilis et inhabilis diversis temporibus*.¹ This case is interesting as showing how strong the presumption of legitimacy was, and how averse the courts were (and are now) to making exceptions to the rule.

¹ Bane's Case, 5 Coke 88, b.

CHAPTER VII.

THE PRESUMPTION AGAINST A SPOLIATOR.

RULE 22—The omission of a party to an action to testify to facts or to produce evidence in explanation of, or to contradict adverse testimony, raises a presumption against his claims,¹ (A) unless the evidence is not peculiarly within his power, (B) or is privileged. (C)

“It is certainly a maxim,” said Lord Mansfield, in *Blatch v. Archer*,² “that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.” The omission of a party to testify to facts within his knowledge in explanation of or to contradict adverse testimony, is a proper subject of consideration both in courts of equity and in courts of law.³ “Where” said Chief Justice Shaw, in *Com. v. Webster*,⁴ probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered—though not alone entitled to much weight; because the burden of proof lies on the accuser to make out the whole case by substantiative evidence. But when pretty stringent proof of circumstances is produced,

¹ *Thompson v. Shannon*, 9 Tex. 536 (1853); *Mitchell v. Napier*, 22 Tex. 120 (1858); *The Lawrence*, 15 Fed. Rep. 635 (1883); *Warner v. Daniels*, 1 Woodb. & M. 90 (1845); *Nicol v. Crittenden*, 55 Ga. 497 (1875). There is no presumption from a party not testifying as a witness in his own case. *Emory v. Smith*, 54 Ga. 273 (1875); *Thompson v. Davitte*, 59 Ga. 473 (1877). Nor from a party failing to testify where the party's mind has become impaired. *Cramer v. City of Burlington*, 49 Iowa, 213 (1878). In a suit against a married woman no presumption arises against her from the fact that her husband does not testify. *Carter v. Beals*, 44 N. H. 406 (1862). A false statement made by a witness out of court raises no presumption that his testimony is false. *Glaze v. Blake*, 56 Ala. 879 (1776).

² Cowp. 63, and see *Wallace v. Harris*, 32 Mich. 330 (1875).

³ *McDonough v. O'Neill*, 113 Mass. 92 (1873). The same inference frequently arises on trials for crime. See *post*, Chap. XX.

⁴ 5 Oush. 316 (1860).

tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution."

Illustrations.

A.

I. The question is whether vessel A. or vessel B. which had collided at night was negligent. The seaman who had charge of the light on vessel A. is not produced; but the owners allege that it was displayed. The presumption is that it was not.¹

II. B., as indorser, sues D. on a note given to one S. for a patent machine which turned out to be a fraud. D.'s defense is that B. was a participant in the fraud, having traveled with S. and aided him when he procured the note from D. The question is whether the B. referred to is the plaintiff. B. refuses to appear at the trial. The presumption is that B. the plaintiff and B. the partner of S. are the same person.²

III. A. refuses to produce a deed which is part of a title which he claims. The presumption is that if produced, the deed would injure his claim.³

IV. The plaintiff relies on the defendants' knowledge of a fact said to be communicated to them in a letter, of which no copy was kept, but the receipt of which they (the defendants) admit. The defendants deny that it contained the statement alleged, but do not produce the letter or satisfactorily account for its non-production. The plaintiff's representation is presumed to be true.⁴

V. B. agrees to make a wagon for M. The latter gives L. a written order upon B. for the wagon, which order B. receives, saying "he would accept it as far as it went." On the trial B. refuses to produce the order.

¹ *The Ville de Havre*, 7 Ben. 528 (1874).

² *Brown v. Schock*, 77 Pa. St. 471 (1875).

³ *Haldane v. Harvey*, 4 Burr. 2486 (1769).

⁴ *Lamley v. Wagner*, 1 DeG. M. & G. 604 (1852).

The presumption is that it was an unconditional order for the delivery of the wagon.¹

VI. In an action on certain promissory notes, the question is whether the plaintiff had been given collateral security, and what amount he had collected and should be credited. A list of these securities is proved to be kept by the plaintiff in a book which he refuses to produce, on the ground that the book is a private one which no one has the right to see. His conduct raises a presumption that the book would contain evidence unfavorable to his side of the case.²

VII. A party after notice refuses to produce an agreement. The presumption is that it is stamped as required by law.³

VIII. Certain goods were seized on a suspicion that they had been fraudulently undervalued when passing the custom-house. The government make a *prima facie* case, and notify the defendants to produce their invoices and correspondence relating to the goods. This they do not do, but introduce evidence of experts as to the value of the goods. The presumption is against the defendants.⁴

IX. An action is brought by A. against B. on a building contract. A. refuses to produce a plan referred to in the specifications annexed to the contract. B. has refused to allow an expert sent by A. to examine the house. The conduct of each raises an unfavorable presumption against himself.⁵

X. A dealer in liquors sues a customer for liquor sold and delivered. The only evidence is that of the dealer's servant, who proves the delivery of full bottles to a certain number at the defendant's house—he does not know their contents. The presumption is that they were filled with the cheapest liquor in which the plaintiff dealt.⁶

XI. In an action for money lent the only evidence is that the defendant having asked the plaintiff for some money, the latter handed him a note which witnesses believed to be a bank-note, but the amount of which they did not know; neither does it otherwise appear. The presumption is it was a note of the smallest denomination in circulation in the country.⁷

XII. A drover is sued for the price of certain cattle entrusted to him to be taken to market and sold. On the trial, he gives no evidence as to

¹ Barber v. Lyon, 22 Barb. 62 (1856).

² Lowell v. Todd, 15 U. C. C. P. 306 (1865); and see Page v. Stephens, 23 Mich. 357 (1871).

³ Crisp v. Anderson, 1 Stark. 35 (1815).

⁴ Clifton v. United States, 4 How. 246 (1846); Attorney-General v. Halliday, 26 U. C. Q. B. 397 (1817).

⁵ Bryant v. Stillwell, 24 Pa. St. 314 (1855).

⁶ Clunnes v. Pezzey, 1 Camp. 8 (1807).

⁷ Lawton v. Sweeney, 8 Jur. 694 (1844).

what he had received for them. The presumption is that he received the highest price paid for such cattle.¹

XIII. A witness refuses to explain matters within his knowledge. The presumption is that the explanation, if made, would be to his prejudice.²

XIV. C. brought an action for \$200 alleged to have been paid to B. as usury. It appears that C. had agreed to pay B. \$1,800 for a third person; B. wrote out notes for \$2,000, and upon C. objecting that the amount was too large, B. replied: "There is our account and other deals, all is put in." C. signed the notes and afterwards paid them. On the trial, to show that there were no other accounts between them C. called on B. to produce his books, which B. did not do. The court instructed the jury that they might infer from this that the books, if produced, would not aid in the defense. *Held*, correct.³

XV. The defendant in a case is represented by five attorneys. On a motion for a new trial, on the ground that one of the jurors was related to the plaintiff, four of these attorneys file an affidavit that they were not aware of this fact before the trial. The presumption is that the fifth attorney did know of it.⁴

In case II. it was said: "He refused to appear, and his refusal is put now on the ground that he was informed by his counsel and believes himself, that the testimony of his identity was illegal. Supposing that to be an honest opinion, yet it did not detract from the *prima facie* effect of his declining to appear as evidence against him. If he relies upon his ability to disprove the motive imputed he takes the risk, but he leaves the effect of his conduct as a matter of evidence for the opposite side to go to the jury who must weigh both sides to determine the real motive. If he knew he was not the Brown who accompanied Simpson, the accomplice, his motive was very strong to appear and by his presence convince the witnesses that he is not the same person called Brown who accompanied Simpson. Omitting to do that by which he could at once dissipate doubt, he leaves his motive to be determined by the jury,

¹ Clark v. Miller, 4 Wend. 628 (1830).

² Heath v. Waters, 40 Mich. 457 (1879).

³ Cross v. Bell, 34 N. H. 83 (1856).

⁴ Brown v. Oatis, 55 Ga. 416 (1875).

assuming the burden of disproving it by rebutting testimony."

In cases like case III. it is laid down that the case of written evidence presents the strongest illustration of the extent of the rule. The non-production of documentary evidence within the party's power raises, it is said, in several cases, a very strong presumption that if produced it would militate against him who withholds it.¹ Therefore in an action of trespass where the plaintiff relied upon bare possession although it appeared that he had taken the premises under an agreement in writing which was not produced, the judge charged the jury that having proved that he was in possession of the close at the time of the trespass, the plaintiff must have a verdict, but that to entitle him to more than nominal damages, he should have shown the duration of the term. In affirming this direction Maule, J., pointed out that the plaintiff had the means of showing the *quantum* of his interest and that "the non-production of the lease raised a presumption that the production of it would do the plaintiff no good."²

In *Attorney-General v. Dean of Windsor*,³ the Master of the Rolls said: "Evidence is always to be taken most strongly against the persons who keep back a document, and the circumstance that the body keeping it back is a corporation does not in the slightest degree affect this principle although it exonerates the present members from blame in that respect. It is true it is urged that this deed is lost, and that nothing of willful suppression is to be presumed against the predecessors of the present corporation, and yet the circumstances undoubtedly require an explanation which they can not now receive."

In case VIII. it was laid down as a general rule that where a party, under an obligation to sustain his case by

¹ *Miller v. Jones*, 32 Ark. 337 (1877); *Grimes v. Kimball*, 3 Allen, 518 (1862); *Bell v. Hearne*, 10 La. Ann. 515 (1855); *Durgin v. Danville*, 47 Vt. 93 (1874); *Parks v. Richardson*, 4 B. Mon. 276 (1843); *Mordecai v. Beall*, 8 Port. 535 (1839).

² *Tryman v. Knowles*, 13 C. B. 222 (1853).

³ 24 Beav. 679 (1857).

proof, relies upon weak and inferior evidence which he produces in the place of stronger and better evidence which is within his power, and which he fails to produce, the presumption arises that if he produced the latter it would injure instead of benefiting his case. "Under these circumstances," said Mr. Justice Nelson, "the claimant was called upon by the strongest considerations, personal and legal, if innocent, to bring to the support of his defense the very best evidence that was in his possession or under his control. This evidence was certainly within his reach, and probably in his counting-room, namely, the proof of the actual cost of the goods at the place of exportation. He not only neglected to furnish it, and contented himself with the weaker evidence, but even refused to furnish it on the call of the government, leaving, therefore, the obvious presumption to be turned against him that the highest and best evidence going to the reality and truth of the transaction would not be favorable to the defense. One of the general rules of evidence of universal application is that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied to the distinction between the higher and inferior degree of proof speaking in a more general and enlarged sense of the terms, when tendered as evidence of a fact. The meaning of the rule is not that courts require the strongest possible assurance of the matters in question, but that no evidence shall be admitted which from the nature of the case supposes still greater evidence behind in the party's possession or power; because the absence of the primary evidence raises a presumption that if produced, it would give a complexion to the case at least unfavorable if not directly adverse to the interest of the party. This is the reason given for exacting in all cases the primary evidence, unless satisfactorily accounted for.

For a like reason — even in cases where the higher and inferior testimony can not be resolved into primary and secondary evidence technically so as to compel the production of the higher, and the inferior is therefore admissible and competent without first accounting for the other, the same presumption exists in full force and effect against the party withholding the better evidence; especially when it appears or has been shown to be in his possession or power, and must and should in all cases exercise no inconsiderable influence in assigning to the inferior proof the degree of credit to which it is rightfully entitled. It is well observed by Mr. Evans² in substance that if the weaker and less satisfactory evidence is given and relied on in support of a fact when it is apparent to the court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory; and that it may well be presumed, if a more perfect exposition had been given it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal.” In *Black v. Wright*, it was said: “It is classed by writers upon the law of evidence and presumptions as amongst the strongest circumstantial proofs against a person, that he omits to give evidence to repel circumstances of suspicion against him, which he would have it in his power to give, if those circumstances of suspicion were unfounded. Hence when witnesses for example depose that the signature to a bond is not in the handwriting of the person sued, and the obligee and alleged obligor live near each other and in the immediate vicinity of the place of trial, and the latter is a man of extensive business whose handwriting is generally known, and the former calls no witness to the point when he might so easily do so, if the signature were genuine, the omission affords the same kind of evidence against the deed that the

¹ 2 Evans' Pothier, 149.

omission of the possessor of stolen property, recently stolen, to account for his possession does against him.”¹

In case IX. the court referred to A.'s conduct as follows: “Maps, surveys and drawings are not to be distinguished from other papers in this respect. A party who withholds them when he ought to produce them, and attempts to supply their place by secondary evidence, is liable to the same presumption against him of trying to suppress the truth as he would subject himself to by withholding paper writing.” And upon B.'s method of acting in the case, the court animadverted at more length. “Before the trial,” said Black, J., who delivered the opinion, “the plaintiff sent a person to examine the house so that he might be able to testify how the work had been done. The witness frankly explained what he came for and the defendant refused to let him go through the house for such a purpose. The evidence of this transaction was objected to, but the court admitted it. The admission of it is complained of here because it was calculated to prejudice the minds of the jury against the defendant's cause. Doubtless it would have that effect and so it ought to have. To smother evidence is not much better than to fabricate. A party who shuts the door upon a fair examination, and then prevents the jury from learning a material fact must take the consequences of any honest indignation which his conduct may excite. The presumption *in odium spoliatoris* is perfectly legitimate. It is so natural and so just that it is a part of every civilized code. We think this evidence most clearly admissible and we certainly would not have found fault with the judge if he had gone further and instructed the jury that it afforded some ground for supposing the whole defense to be unfair.”² It ought to be understood that where a party has the subject-matter of the controversy under his exclusive control, it is never safe

¹ Black v. Wright, 9 Ired. (L.) 447 (1849).

² The defense was that the work on the house had been imperfectly and negligently done.

to refuse the witnesses on the other side an opportunity to examine it unless he is able to give a very satisfactory reason. Here there was no ground to believe that the witness would misrepresent what he might see. If the defendant had felt such a suspicion, he could have shown the house to as many others as he chose, and overwhelmed the one perjured man by a host of honest ones. I ought to add, however, that such evidence must always be confined strictly to the conduct of the party in and about the very cause in which it is used. It must not only relate to the same subject, but to the same investigation of it; for it is received not on any principle of primitive justice, but on the natural presumption that he withholds the truth because he knows that it will work against him, and that no man prefers darkness to light, except because he is conscious that his deeds are evil. If, therefore, the defendant should not refuse an examination for the purpose of the next trial, he can not be prejudiced by what he did before the last, etc. It is true, also, that the strength of such a presumption diminishes in very rapid proportion to the time that elapses between the act out of which it rises, and the judicial inquiry which the act was intended to influence.”

Case X. is an illustration of the rule that where the vendor of goods sold without any express stipulation as to value neglects or refuses to give any evidence of their value, they are presumed to be worth only the lowest price for which goods of their description usually sell.

In case XI. it was said: “The handing of a note to a party is *prima facie* evidence of a loan, and as there was no proof of the amount of the value secured by the note, the jury ought to presume it to have been the lowest in circulation in this country.¹

In case XII. it was said: “The evidence as to the value of cattle was somewhat contradictory, but it is to be borne in mind that it was in the defendant’s power to remove all

¹ And see *Hayden v. Hayward*, 1 Camp. 180 (1806).

doubt on the subject, as they and they alone knew to whom they were sold and for what prices. Under such circumstances it was the duty of the jury to allow the highest sum which, according to the evidence in the case, they could probably have been sold for."

In case **XIII.** it was said: "If defendant, Waters, had performed the duty which common honesty required of him, the production of his books would probably have made the accounting brief and simple. It would also have put an end to any question of fraud, if his conduct had been, as he claims, what it should be. No stronger evidence of probable fraud could exist than the obstinate and offensive manner in which every attempt to get at the real state of the partnership business was resisted, not only by Daniel Waters, but by his associates and his banker. The latter, who seems to have been honest in his remarkable notion that banking business was privileged from scrutiny, was probably free from any wrong design. The spirit of the others is manifest. The effect of this scandalous conduct was to protract the inquiry for several years, until, as is now claimed, the books have been destroyed. And in this condition of affairs defendant contends that his general denials in regard to profits should exempt him from any decree. And it is urged that by failing to have him punished for contempt or compelled to answer, complainant lost the means of proof. We are certainly convinced that it is to be regretted the conduct of defendant was not punished severely. But it is not very plain to us how far such punishment would have advanced the accounting. Complainant had the right to introduce the best evidence at her command and make out as good a case as she could. Nor do we think much attention should be paid to defendant's testimony. The benefit of cross-examination is an essential condition to the reception of direct testimony. There are cases in which a failure to respond on cross-examination will justify the exclusion of at least so much of the direct testimony as it might have qualified. It must always dam-

age its credit. When the witness who evades or refuses cross-examination is the chief party in interest, or one who is plainly seeking to screen him, it is no more than common justice to disregard his testimony in his own favor when it needs explanation. We may, and should assume, that when he refuses to explain what he can explain, the explanation would be to his prejudice. And when, as in this case, his testimony is directly falsified by facts well proved, the reasons for rejecting it are very strong."

In case XIV. it was said: "The court charged the jury that they might infer from the fact that the books were not produced, that they would not aid the defense, if produced. Upon this point there are many authorities, some of which we will consider. Greenleaf says that the mere non-production of books upon notice has no other legal effect than to admit the other party to prove their contents by parol, unless under special circumstances,¹ and he cites *Cooper v. Gibbons*,² which sustains the position. Substantially to the same point are Roscoe's Cr. Ev.;³ *Life and Fire Ins. Co. v. Mechanic Fire Ins. Co.*,⁴ *Symington v. McLin*.⁵ In *Clifton v. United States*,⁶ goods had been seized upon suspicion of being fraudulently imported. On the trial it was shown by the government that there was sufficient ground for the opinion of the court that probable cause existed for the prosecution, and notice was given to the claimant to produce his books and accounts relating to those goods. This he declined to do, and it was held to be proper for the court to instruct the jury, if the claimant withheld the testimony of his accounts and transactions with the parties abroad from whom he received the goods, they were at liberty to presume that, if produced, they would have operated unfavorably to his cause. In *Thayer v. Middlesex Mutual Fire Ins. Co.*,⁷ Shaw, C. J., says: 'The rule that upon

¹ 1 Greenl. Ev., sec. 37.

² 3 Camp. 363.

³ p. 11.

⁴ 7 Wend. 31.

⁵ 1 Dev. & B. 291.

⁶ 4 How. 242.

⁷ 10 Pick. 320.

the trial of controverted facts the party having the custody and control of books, documents, and papers, shall, on notice, produce them, and that on refusal to do so the adverse party may give evidence of their contents, and that all inferences from such secondary evidence shall be taken most strongly against the party refusing to produce them, is a highly reasonable and beneficial rule, tending to the discovery of truth, and to the formation of honesty, frankness, and fair dealing, and ought not to be shackled or obstructed by strict constructions or technical niceties.' In *Jackson v. Mc Vey*,¹ defendant gave general evidence that a deed which was in court, in possession of the opposing party, who refused to produce it, had been in the possession of a witness who was upon the stand, and the witness testified that he had often perused the deed, even supposed that the premises were included in it. But on cross-examination he said that he could not recollect a single course stated in the deed, and that he did not know, but thought the premises were embraced in it. The circuit judge disregarded the testimony, but the Supreme Court, on a motion for a new trial, held that the testimony should have gone to the jury, with strong intimations that they ought to believe that the premises were included in the deed; since if they were not, the plaintiff, by producing it, could show with certainty how the fact was; and that its non-production, the deed being in court, was very strong presumptive evidence against the plaintiff. The rule to be extracted from the authorities would appear to be this, that when the books or papers are shown to be in the hands of the opposing party, but no evidence is given of their contents, the refusal to produce them is not to be regarded as *prima facie* evidence that, if produced, they would prove what the party calling for them alleges they contain. In such a case there is no legal presumption as to their contents. But where, after notice and refusal to produce them, and it is shown or

¹ 18 Johns. 338.

admitted that they are under the control of the party, and secondary evidence is given, and such evidence is imperfect, vague, and uncertain, every intendment and presumption is to be made against the party who might remove all doubt by producing the higher evidence. Before any presumption can be made against the party on the ground of refusal to produce, and having the possession of the books or papers, some general evidence of their contents, as applicable to the case, must be given. The alleged usury in this case consisted in the addition of \$200 to notes given for a debt of \$1,800; and upon the plaintiff's objecting that the notes were too large, the defendant replied: 'There is our account and other deals—all is put in.' Now, although this evidence might not be such as to raise a legal presumption against the defendant, or to make out a *prima facie* case that the books, if produced, would aid the plaintiff, yet we think that after such evidence, and notice to the party to produce the books, which appeared to be under the control of the defendants, the jury might and would infer, as a matter of fact, that the production of the books would not aid the defense. Such would be the natural effect upon the mind in considering such evidence; and unless, as matter of law, the court must say that such inference shall not be drawn, the ruling must be sustained; for it was simply telling the jury that they might draw a negative inference, which was a natural consequence from the fact, and which in all probability they would have drawn without any intimation from the court to that effect. We are aware of no rule of law, nor do the authorities show that the jury might not take such a course. Upon the doctrine of *Clifton v. The United States*, it would seem that the court might have instructed the jury that a legal presumption arose in favor of the plaintiff; but that is not the question as presented by this case, and the ruling did not go to that extent. So far, however, as the court went, in the instructions given, we think that the authorities gener-

ally will sustain the ruling, and that the defendants have no good cause of complaint. It is not a case destitute of evidence, and does not fall within the rule in such cases. The plaintiff had shown that the payee of the notes had said in effect that his account was included in the notes, and it was this account that was called for, and if the books would have aided the defendants they would no doubt have been produced."

In *Braithwaite v. Coleman*,¹ which was an action by the indorsee against the drawer of a note, the only evidence of notice of dishonor was the statement of the defendant to a witness. "I have several good defenses to the action; in the first place the letter was not sent to me in time." The defendant had been notified to produce this letter, but did not do so. Lord Lyndhurst directed the jury that they might presume that the letter, if produced, would be found to have contained a notice in proper time. On appeal Denman, C. J., thought the direction right. "The defendant admits," said he, "he received the letter and as he does not produce it, it might be fairly inferred by the jury that it *was* in time." But the other members of the court were of a contrary opinion, and a new trial was ordered. "The letter," said Patteson, J., one of the majority, "might have been dated on the proper day, but sent by private hand or in some mode so that it did not arrive till many days after; was the defendant therefore bound to produce a letter which, on the face of it, would destroy his own case, and which he might not have evidence to explain? I think not; and that it is not to be presumed against him from the mere non-production of the letter, that the notice was sent in time." But in the case of *Curlewis v. Corfield*,² which six years later came before the same court, and nearly the same judges, a different conclusion was reached. The issue was as in the

¹ 1 HARR & WOLL, 229 (1836).

² 1 Q. B. 814 (1841).

former case whether the defendant had received due notice of dishonor of a bill of exchange. There was evidence that the day after the dishonor, the plaintiff wrote and sent a letter to the defendant which was put in his letter-box, the office being closed. Some time after the defendant told the plaintiff's attorney that the bill had not been presented in time, but said nothing as to the notice. The defendant, though notified to produce this letter on the trial, did not do so. It was held that the jury might presume that the letter contained a regular notice of dishonor. In *Bell v. Frankis*,¹ also an action by the indorsee against the drawer of a bill of exchange, it appeared that the defendant had told a witness that he expected to receive by post a notice of its dishonor, and afterwards gave him a letter he received by post, requesting him to negotiate a renewal of the bill; but the letter, which had found its way into the defendant's hands, was not produced at the trial. It was ruled that the jury were warranted in inferring that no notice of dishonor had been given.²

Where withholding testimony raises a presumption that a fact not clearly proved or disproved exists, it is not error for the court to allude to the fact of withholding as a circumstance strengthening the proof.³ But an instruction that "everything may be presumed against the spoliator of the will," has been held too broad.⁴

In *Hammersmith, etc., R. Co. v. Brand*,⁵ Lord Cairns, in speaking of the measure of damage for annoyance arising from the vibration of passing railway trains, said: "What you have to find is what is the actual deterioration in value. You have a certain house and near it what I may call a vibrating railway — I mean a railway in the use of which there can not fail to be vibrations — the house was of a cer-

¹ 4 Man. & Gr. 447 (1842).

² And see, *Lobb v. Stanley*, 5 Q. B. 574 (8144.)

³ *Frick v. Barbour*, 64 Pa. St. 120 (1870).

⁴ *Bott v. Wood*, 56 Miss. 126 (1873).

⁵ L. R. 4 H. L. 224 (1869).

tain value before the railway was put there ; if the railway causes vibration, evidence can easily be obtained to prove what the amount of deterioration in value is, and the sum can be awarded accordingly. The subject may be illustrated farther by supposing a house used for a particular purpose, say that of a watch or clockmaker, which requires particular steadiness, serious injury might be done there, and the house might become useless for the particular purpose for which it was used before. But in addition to that it is said you ought to know how many trains a day there will be running and the weight of them, and the speed at which they will pass. There is a well known principle which applies to such cases which is that if the persons against whom the claim is made are not willing to bind themselves as to the maximum number of trains or the weight or the speed, then the sum must be taken most strongly against the company, upon the principles enunciated in the well known old case of *Armory v. Delamirie*, and the largest amount of injury which can be sustained would probably be considered to be the amount to be awarded by the tribunal which has to award compensation.”

B.

I. A. does not produce one of his muniments of title. He proves that it is in the possession of B., from whom he can not obtain it. There is no presumption against A.¹

II. In a suit between C. and D. C. does not call F., who was a witness to the thing in dispute. There is no presumption against C. if it was equally within the power of D. to call F.²

III. There is no proof that a party has withheld evidence. The non-production of better evidence, more full and definite than he presents, raises no presumption against him.³

In cases like case I. the rule is that where the evidence alleged to be withheld is unattainable, the presumption does

¹ *Gilbert v. Ross*, 7 M. & W. 131 (1840) ; *Marston v. Downes*, 1 Ad. & Ell. 32 (1834).

² *Scovill v. Baldwin*, 29 Conn. 318 (1858).

³ *Schnell v. Toomer*, 56 Ga. 168 (1876).

not arise. Therefore, if a deed be in the possession of an adverse party, and not produced, or if it be lost and destroyed, no matter whether by the adverse party or not, secondary evidence is clearly admissible; and if the deed be in the possession of a third person who is not by law compellable to produce it, and he refuses to do so, the result is the same. In *Merwin v. Ward*,¹ an action for trover, the defendants had notified the plaintiffs to produce their books in which entries of the goods claimed were made. The plaintiffs did not produce them, and the defendants asked the judge to instruct the jury that this refusal created a presumption against them, which he refused. On appeal his ruling was affirmed. "Where a party," said Waite, J., "has in his possession a deed or other instrument necessary to support his title, and he refuses to produce it, and attempts to make out his title by other evidence, such refusal raises a strong presumption that the legitimate evidence would operate against him. But this rule does not apply to such documents as a party has no right to give in evidence, without the consent of the adverse party. In this case the action was trover. The plaintiff's books were not legal evidence in support of his title. Had he produced them in compliance with the notice he could not have read them to the jury without the defendants' permission. He was, therefore, under no obligation to produce books which the defendants might or might not give in evidence at their pleasure. His refusal to produce them gave the defendants a right to give secondary evidence of their contents and nothing more. That right was conceded on the trial, but such secondary evidence was not given. In this respect there is no cause for complaint, and none is made. The question is not what inference the jury might have drawn from the books had they been produced; or from the secondary evidence of the defendants had it been given, but whether, in the absence of all such evidence, they were in

¹ 15 Conn. 377 (1843).

law bound to raise a presumption against the plaintiff. A presumption of what? That the books contained entries showing that the plaintiff had no title. It is difficult to see what else they could presume against him. This surely would be going too far."

"The circumstance," it was said in case II., "that a particular person who is equally within the control of both parties is not called as a witness is too often made the subject of comment before the jury. Such a fact lays no ground for any presumption against either party. If the witness could aid either party, such party would probably produce him. As he is not produced the jury have no right to presume anything in respect to his knowledge of any facts in the case."

C.

I. A. does not call B., who possesses important information concerning the case. No presumption arises against A. if B. is A.'s professional adviser, and the knowledge was professionally acquired.¹

RULE 23. — But the presumption arising from the non-production of evidence within the power of the party does not relieve the opposite party altogether from the burden of proving his case.²

Illustrations.

I. On the trial of an action the fact sought to be proved by the production of books and papers which the party in whose possession they were was notified to produce is, that a deed existed from one of the partners of a firm to the firm itself. The jury are not at liberty to consider a refusal to produce the books and papers as a reason upon which to presume the existence of the deed.³

II. In an action on a fire insurance policy a party refuses to produce books and papers in his possession after a notice to produce had been duly served on him. This does not raise the presumption that, if pro-

¹ *Wentworth v. Lloyd*, 10 H. L. Cas. 569 (1864).

² *Cooper v. Gibbons*, 3 Camp. 363 (1813); *Attorney-General v. Le Merchant*, 3 Term Rep. 201.

³ *Hanson v. Eustice*, 2 How. 653 (1864).

duced, they would establish the fact which the party calling for them alleges they would prove.¹

III. In an action on a policy of fire insurance, the defense is that the preliminary proofs of loss were not as required by the terms of the policy. The proofs are in the defendant's possession and they are notified to produce them, but refuse. The presumption does not arise that the papers contained proper proof.²

IV. Certain defendants are sued for penalties in defrauding the government of revenue on whisky. The trial court instructs the jury that it is a rule of law that where a party has proof in his power, which if produced would render material facts certain, the law presumes against him, if he omits to produce it, and authorizes a jury to resolve all doubts adversely to his defense. This is erroneous.³

In case I. it was said: "All inferences shall be taken from the inferior evidence most strongly against the party refusing to produce; but the refusal itself raises no presumption of suspicion or imputation to the discredit of the party, except in a case of spoliation or equivalent suppression. There the rule is that *omnia præsumentur contra spoliatores*. In other words, with the exception just mentioned, the refusal to produce books or papers upon notice is not an independent element from which anything can be inferred as to the point which is sought to be proved by the books or papers. Nor can any views of policy growing out of the refusal be associated with the secondary evidence to enlarge the province of the jury to infer or presume the existence of the fact to which that evidence relates. For considerations of policy, being the source, origin, and support of artificial presumptions, having no application to conclusions as to actual matter of fact, the finding of a jury in conformity with such considerations and not according to their actual conviction of the truth, resolves itself into a rule or presumption of law."

"The rule," said the court in case II., "is this. The party in such a case may give secondary or parol proof of

¹ Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co., 7 Wend. 84 (1831); Rector v. Rector, 8 Ill. 120 (1846).

² Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1 (1856).

³ Chaffee v. U. S., 18 Wall. 516 (1873).

the contents of such books or papers if they are shown or admitted to be in the possession of the opposite party, and if such secondary evidence is imperfect, vague, and uncertain as to dates, sums, boundaries, etc., every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence. But they must be shown to be in his possession, and some general evidence of such parts of their contents as are applicable to the case must first be given before any foundation is laid for any inference or intendment on account of their non-production."

"There was no obligation on the defendant," it was said in case III., "to show any defect in the preliminary proof until the plaintiff had first made out a *prima facie* case of compliance with the requirements of the policy on that subject, which we think has not been done."

In case IV. it was said: "The purport of this was to tell the jury that although the defendants must be proved guilty beyond a reasonable doubt, yet that if the government had made out a *prima facie* case against them, not one free from all doubt, but one which disclosed circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumption of the law, that full proof which should dispel all reasonable doubt. In other words, the court instructed the jury in substance that the government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not they were guilty beyond a reasonable doubt. * * * The error is palpable in its statement. All the authorities condemn it. * * * The instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what, at law, was intended for their protection

—the right to refuse to testify — into the machinery for their sure destruction.”

RULE 24. — The alteration, suppression, falsification, destruction or manufacturing of evidence raises a presumption against the spoliator, where the evidence is relevant to the case (A), or it was his duty to preserve it (B), — *omnia præsumuntur contra spoliatorem*.

The maxim *omnia præsumuntur contra spoliatorem* embraces most frequently cases of the destruction of written evidence. Manufacturing evidence also falls within this rule, but it has been said that to smother evidence is not much better than to fabricate it.¹ “Spoliation,” it is said in one case,² “is always looked upon by a court of justice with suspicion.” “The maxim,” it is said in another, “has been a most effective instrument in the hands of justice to punish wrong-doers.”³ “Whenever the rights of a party are either withheld or violated, the presumption of law is that damage has been sustained.”⁴ Presumptions between a wrong-doer and a person wronged should be made in favor of the latter.⁵

Illustrations.

A.

I. A chimney-sweep finding a jewel takes it to a goldsmith to learn its value. The tradesman pretends that it is worth but three pence, when the sweep demanding it back, he returns the empty socket without the stone. In an action of trover by the sweep against the smith, there is

¹ Black, J., in *Bryant v. Stillwell*, 24 Pa. St. 314 (1855).

² *Little v. Marsh*, 2 Ired. Eq. 28 (1841).

³ *Heslop v. Heslop*, 82 Pa. St. 53 (1876); *Loomis, J., in Harris v. Rosenberg*, 43 Conn. 227 (1875). “If the jury should be convinced of the spoliation, it would be their duty to infer anything in favor of the deed as against the spoiler. *Diehl v. Emig*, 65 Pa. St. 328 (1870.)

⁴ *Tedder v. Stiles*, 16 Ga. 2 (1854).

⁵ *Costigan v. Mohawk, etc., R. Co.*, 2 Denio, 600; 43 Am. Dec. 758 (1846); *Stewart v. Preston*, 1 Fla. 10; 44 Am. Dec. 621 (1846); *Jackson v. Miller*, 6 Wend. 233; 21 Am. Dec. 316 (1830); *Snyder v. Riley*, 6 Pa. St. 164; 47 Am. Dec. 423 (1847).

no evidence of the value of the stone. The law presumes that it was a jewel of the finest water, of the size of the socket.¹

II. Certain jewellers had lost from their shop a valuable diamond necklace consisting of fifty-six brilliants. Thirty of the stones, which formed the sides of the necklace, together with the large diamond which was in its center, were traced to the possession of the defendant, and he gave contradictory accounts as to how he had obtained them. In an action of trover for the value of the whole necklace, the jury may presume that the whole necklace had been in the defendant's possession.²

III. The plaintiff and the defendant having married two daughters of one S., upon his decease some loose papers that concerned the accounts between the defendant and S., were put up in a bundle, tied with a tape, sealed in the presence of two persons, and delivered to him. An account being subsequently decreed, the defendant charged the plaintiff with a debt as due from the estate. It was proved that the defendant had opened the bundle and had so altered and displaced the papers that it could not be known what papers had been abstracted. The lord chancellor disallowed his claim, although satisfied, as the defendant had sworn, that all the papers had been produced, on the ground that *in odium spoliatoris omnia præsumuntur*.³

IV. A widow before her marriage with her second husband assigned over an estate of the alleged value of £800 to trustees in trust, for her children by her first husband. The second husband having obtained possession of the deed and suppressed it, was ordered to pay over £800 instead of an account of the value being directed to be taken.⁴

V. A. is prevented by the acts of B. from showing the quality of wool for the taking of which he had brought suit. B. is liable for the value of the best quality of such goods.⁵

VI. A deed limiting a term is burnt by the defendant, who contends that the limitation is void. Since the term might be limited so as to legally take effect, the presumption is that it was so limited.⁶

¹ *Armory v. Delamirie*, 1 Smith L. C. 357; or in the words of the poet:

"And seeing by this wickedness the stone
Was made away and his worth known to none
Craftsmen there came to show by weight and tale
What gems of best and uttermost avail
Might in the compass of that ring be laid
With no less damage it should be paid
For what man hideth truth in wrong-doing,
Against him the law deemeth everything."

—[*Leading Cases Done into English*, London, 1878.

² *Mortimer v. Craddock*, 17 Jur. 45.

³ *Wardour v. Beresford*, 1 Vern. 452 (1687).

⁴ *Hunt v. Matthews*, 1 Vern. 408 (1686).

⁵ *Bailey v. Shaw*, 24 N. H. 300 (1851).

⁶ *Dalston v. Coatsworth*, 1 P. Wms. 731 (1731).

VII. A vendor of real estate seeks to avoid the enforcement of his contract to convey on the ground that by its terms, time was of the essence thereof, and bound the vendee to pay the purchase-money at a specified time or forfeit his rights. The vendee denies this. The fact that the vendor destroyed the contract after being delivered to him by his agent with whom it was deposited, and while the vendee was seeking a deed from him, raises the presumption that the contract did not contain such stipulations.¹

VIII. Goods in a store are carried off and sold by a purchaser with full knowledge that they had previously been mortgaged. The burden of showing what proportion of the whole quantity taken was covered by the mortgage is cast on him, and he is compelled to bear any loss arising from the impossibility of ascertaining the exact quantity.²

IX. The obligor of a bond has obtained possession of it and destroyed it. It will be presumed to have been given for a valuable consideration.³

X. The evidences of payment made to him upon a purchase of land are destroyed by a party. Every presumption will be against him, and if he offers to convey upon the payment of a given sum, at the time of such destruction, the court will be fully warranted in finding that no more than such sum was due after deducting such payments.⁴

XI. The defendant, in 1848, executed and delivered a deed of land to the guardian of one M., which was never recorded. In 1875 the deed could not be found. The defendant testified that it conveyed only five acres of land; that the guardian, who had in the meantime died, took the deed away with him, and that he had not seen it since. But the weight of evidence showed that the deed conveyed forty acres, and that after delivery it was returned to defendant to be recorded, and was by him lost or destroyed. If it were necessary the presumption *omnia præsumuntur contra spoliatorem* would be applied.⁵

XII. A. had caused B., who claimed the title and family estate, as heir, to be kidnapped and sent to sea, and afterwards endeavored to have him convicted on a false charge of murder. The court left it to the jury whether "the presumptions arising from the kidnaping and the prosecution for murder, do not speak stronger than a thousand witnesses." They found in favor of B.⁶

XIII. An action is brought to recover of a steamboat the damages received by a canal boat in a collision. The steamboat sets up as a

¹ Warren v. Crew, 23 Iowa, 315 (1867); and see Jackson v. McVey, 18 Johns. 331 (1820); Kent v. Bottoms, 3 Jones (Eq.), 69 (1856).

² Preston v. Leighton, 6 Md. 88 (1854).

³ Carneal v. Day, Litt. Sel. Cas. 492 (1831).

⁴ Downing v. Plate, 90 Ill. 268 (1878).

⁵ Barney v. Seeley, 88 Wis. 381 (1875).

⁶ Annesley v. Earl of Anglesea, 17 How. St. Tr. 1430 (1743); see Winchell v. Edwards, 57 Ill. 41 (1870).

defense the extreme darkness of the night, and her master produces a log book purporting to have been kept by him, which shows this. In rebuttal evidence is introduced to show that the log book is false, and had been written up for the purpose of the case. This raises a presumption against the defendant.¹

XIV. An action had been brought by A. and his wife for injuries sustained by the latter through B.'s negligence. On the trial, one W. testified that he, A., and C., a clerk of A.'s attorney, were together at A.'s house, when A. said that if W. would give evidence as to the accident he should share the verdict; A. knew that W. was not present at the accident, and C. said if W. would not testify, he, C., would get other witnesses. Two other witnesses testified to similar proposals made to them by C., but not in A.'s presence, to give false evidence. A. was not present at the accident, and neither he nor C. had been called as witnesses. The evidence was admissible.²

XV. It is shown that a sealed certificate, which if genuine should have a genuine seal, is stamped with a false one. This raises a very strong presumption that the signature is false.³

XVI. In an account book of one M., offered in evidence, there was this entry: "June 30, 1859, P. W. Sterling, credit by cash, \$135." It appeared that in October of that year M. had altered this entry by crossing with ink the word "by" and making it read "to," and changing the word "credit" and making it read "debtor," without the knowledge or consent of Sterling. The presumption is that at the time the entry was made it was true, and that Sterling is entitled to a credit of \$135.⁴

"The jury were justified," said, Tindal, C. J., "in case II., as against an evident wrong-doer, in coming to the conclusion to which they did come. The case is I think stronger than that of *Armory v. Delamirie*." (Case I.).

In case XIII., it was said: "This conclusion disposes of the case; for in a conflict of evidence such as the case presents the production of a fabricated log warrants the rejection of the testimony which it is brought to support. If possible it ought never to happen that a case sought to be supported by a fabricated log-book should succeed; and while charges of this kind are not to be listened to unless based upon strong evidence, if they are supported by testi-

¹ The Title, 7 Ben. 323 (1874).

² Moriarty v. London, etc., R. Co., L. R. 5 Q. B. 314 (1870).

³ People v. Marion, 29 Mich. 81 (1874).

⁴ Shells v. West, 17 Cal. 324 (1861).

mony and remain unanswered in the evidence, they compel an adverse decree."

"The conduct of a party to a cause," said Cockburn, C. J., in case XIV., "may be of the highest importance in determining whether the cause of action in which he is plaintiff or the ground of defense, if he is defendant, is honest and just; just as it is evidence against a prisoner that he has said one thing at one time and another at another, as showing that the recourse to falsehood leads fairly to an inference of guilt. Anything from which such an inference can be drawn is cogent and important evidence with a view to the issue. So if you can show that a plaintiff has been suborning false testimony, and has endeavored to have recourse to perjury, it is strong evidence that he knew perfectly well his cause was an unrighteous one. I do not say that it is conclusive; I fully agree that it should be put to the jury with the intimation that it does not always follow, because a man not sure he shall be able to succeed by righteous means, has recourse to means of a different character, that that which he desires, namely, the gaining of the victory, is not his due, or that he has not good ground for believing that justice entitles him to it. It does not necessarily follow that he has not a good cause of action, any more than a person's making a false statement to increase his appearance of innocence is necessarily a proof of his guilt; but it is always evidence which ought to be submitted to the consideration of the tribunal which has to judge of the facts."

The maxim is an old rule of the court of chancery.¹ "Where deeds or writings are suppressed," it was said as early as 1677 "*omnia præsumentur*, etc., and he who has committed iniquity shall not have equity."² In equity the

¹ *Cookes v. Hellier*, 1 Ves. sr. 235 (1749).

² *Gartside v. Ratcliff*, Chac. Cas. 292 (1677). "The court," it was said in a North Carolina case (*Italyburton v. Kershaw*, 3 Dessau. 105 (1810)), "will go very far in presuming against those who destroy papers and instruments necessary to the security or elucidation of the rights of others *in odium spoliatoris*, as it is expressed, even where the spoliation is done unadvisedly and not fraudulent."

suppression of documentary evidence always raised the presumption that it would, if produced, show something unfavorable to the party withholding it.¹ And where a defendant swore that he had burnt a deed, but afterwards produced it, he was compelled to admit it as laid in the bill.² And in chancery, although the court would not decree on the testimony of a single witness against the express denial on oath of the defendant, yet where the written evidence had been destroyed by the defendant *pendente lite*, the court would assume that if forthcoming, it would have proved the statement of the single witness.³ If a woman about to marry, parts with part of her property or gives a security or assessment without the knowledge of her intended husband, this is a fraud on his rights which equity will relieve.⁴ But a debt contracted for valuable consideration is not within this rule. Nevertheless where a husband failed to set aside a bond given for a valuable consideration by his wife before his marriage, the chancellor *on the ground of the concealment from the husband* thought it a proper case to refuse costs against him.⁵ So a court of equity will entertain jurisdiction on complainant's oath of a trespass done secretly and hard to be proved, as the digging of one man underground into another's minerals,⁶ or the trading of an interloper to the West Indies in violation of another's charter.⁷ So where bailiffs who had served an execution found hidden in the barn a sum of money which they carried away, the oath of a party injured was held sufficient to charge the spoliators,⁸ and so where a person ran away with a casket of jewels belonging to another.⁹

¹ *Owen v. Flack*, 2 Sim. & Stu. 606 (1836).

² *Sansam v. Ramsay*, 2 Vern. 561 (1706); *Hampden v. Hampden*, 1 Brown P. C. 260.

³ *Gray v. Haig*, 20 Beav. 219.

⁴ *Lady Strathmore v. Bowes*, 1 Ves. 22.

⁵ *Blanchet v. Foster*, 3 Ves. sr. 285 (1751).

⁶ *East India Co. v. Sandys*, 1 Vern. 127 (1683).

⁷ *Id.*; *East India Co. v. Evans*, 1 Vern. 308 (1684).

⁸ *Childrens v. Saxby*, 1 Vern. 207 (1683).

⁹ *East India Co. v. Evans*, 1 Vern. 306 (1684).

In an anonymous case in Lord Raymond,¹ it was said by Chief Justice Holt, that if a man destroy a thing that is designed to be evidence against himself a small matter will supply it, and the defendant having torn up his own note signed by himself, a sworn copy was admitted to be good evidence to prove it. In *King v. Arundel*,² it was held that where title deeds are suspected to have been suppressed or withheld by the defendants or those under whom they claim, the court of chancery will decree that the plaintiff shall hold the lands until the deeds are produced.³ In *Leeds v. Cook*,⁴ where a letter had been written by the plaintiff to a witness and the latter had been served with a *subpœna duces tecum* to produce it, but the plaintiff had previously procured it from the witness, and refused to produce it, it was held that parol evidence of its contents was admissible. It was objected that the plaintiff had received no notice to produce it. But Lord Ellenborough said: "It belonged to the witness called, and was subtracted in fraud of the subpœna, as therefore, the plaintiff secreted it, and refused to procure it, *in odium spoliatoris* parol evidence of its contents should be admitted." Other instances of the application of the maxim are to be found in the mercantile law, in the rule that where a drawee of a bill of exchange destroys a draft presented to him for acceptance he is liable thereon as if he had accepted it;⁵ and the principle that a person who wrongfully takes or converts a note to his own use by negotiating it is liable for its full value.⁶

In an action of ejectment by the heir against a devisee, the testator's competency was disputed. The defendant, after proving that the testator had given a reasonable account of the real property left to him by his father,

¹ Rep. 781.

² Hob. 109, *Dalston v. Oatsworth*, 1 P. Wms. 130 (1721).

³ See in explanation of this case, *Cowper v. Cowper*, 2 P. Wms. 749.

⁴ 4 Esp. 256 (1803).

⁵ *Jenne v. Ward*, 2 Stark. 327 (1818).

⁶ *Decker v. Matthews*, 12 N. Y. 313 (1855).

offered in confirmation thereof to put in his father's will, which was in court. The plaintiff objected to its admission and it was withdrawn. In summing up, Cockburn, C. J., adverted to the fact, and told the jury that they might infer from the plaintiffs objecting to the will being put in that it was conformable to the statement made by the testator. On appeal this direction was approved by the full court. Williams, Crowder, and Willes, J.J.¹

"Where the exact contents of a will can not be ascertained, if it has been destroyed or suppressed by a person interested in opposition thereto, the court or jury *in odium spoliatoris* will be authorized to presume many things as against the party who has been guilty of the fraudulent act."² It has been held that where the question was whether a former will had been revoked by a will made subsequently, the contents of which it was alleged differed from those of the former will (the later will not being produced the exact difference did not appear) evidence of spoliation on the part of the claimant under the former will, would raise the presumption that it had been revoked by the later will.³ In *Jones v. Murphy*⁴ it was said: "If, therefore, on another trial, the jury should find the *factum* of a subsequent will, and that this will was destroyed or withheld by fraud, they may, and, as I conceive, are bound to infer that the second will contained inconsistent dispositions with the first; nay, more *in odium spoliatoris*, that the second will contained a clause expressly revoking all former wills. In point of law it must be regarded as a will subsisting at the death of the testator, so as to operate as a revocation of all former devises. It is far better that there should be an intestacy than that a spoliator should be rewarded for his dishonesty." Where a letter which, it

¹ *Sutton v. Davenport*, 27 L. J. (C. P.) 54 (185).

² *Betts v. Jackson*, 6 Wend. 173 (1830).

³ *Harwood v. Goodright*, Cowp. 91 (1774).

⁴ 8 W. & S. 301 (1844).

was claimed was part of a will, was destroyed by the universal legatee, the maxim was applied.¹

B.

I. A., a trustee, fails to preserve his vouchers for disbursements and expenses. The presumption is against A.'s claim.²

II. A confidential agent who is bound to keep regular accounts neglected to do so, and to preserve vouchers against himself, though he has preserved those in his favor. He is not permitted in equity to recover for his charges as solicitor.³

III. The agent of a candidate for Parliament has destroyed the accounts and records of a contested election. The candidate being the respondent in the proceedings, the strongest conclusions will be drawn against him, and every presumption made against the legality of the acts concealed by such conduct.⁴

IV. In an action on the bonds of a corporation it is denied that the corporation was properly organized. A minute book, offered in evidence to show its organization, and the regularity of the issue of the bonds disappears *pendente lite*. It is traced into the hands of the officers of the alleged corporation, but its whereabouts is not shown. The presumption is that it has been concealed because of the evidence which it would show of the legality of the organization and the validity of the bonds.⁵

V. A trustee destroys a trust instrument. The presumption is that it contained matters prejudicial to his interest.⁶

VI. In the settlement of a partnership the partner who made the purchases being called on to produce the original invoices, produces some, but not all; those produced show overcharges. The presumption is that the others if produced would have shown similar overcharges.⁷

The duty of a trustee or of an agent in charge of property to keep regular and correct accounts is imperative. If he does not every presumption of fact is against him. He can not impose upon his principal or *cestui que trust* the

¹ *Lucas v. Brooks*, 23 La. Ann. 117 (1871).

² *Landis v. Scott*, 33 Pa. St. 498 (1859).

³ *White v. Lincoln*, 8 Ves. 363 (1803).

⁴ *Hunter v. Lauder*, 8 Canada L. J. (N. S.) 17 (1873).

⁵ *Riggs v. Pennsylvania R. Co.*, 16 Fed. Rep. 804 (1883).

⁶ *Jones v. Knauss*, 31 N. J. (Eq.) 609 (1879).

⁷ *Bush v. Gulon*, 6 La. Ann. 797 (1861). For a recent application of the maxim where in a contest between partners it was shown that one partner had suppressed and destroyed evidence, see *Pomeroy v. Benton*, 77 Mo. 64 (1893).

obligation to prove that he has actually received what he might have received, and what it was his duty to endeavor to obtain. By failing to keep and submit accounts, he assumes the burden of repelling the presumption and disproving negligence and faithlessness."¹

"If," said Nixon, J., in case IV., "I was obliged to put the ultimate determination of the suit upon these questions, I should draw unfavorable inferences from the conduct of the officials of the company in regard to the book, and should be quite willing to assume that it had been put out of the way because it contained proof of material facts which the defendant corporation was anxious to suppress."

In case V. it was said: "His position is one where he is liable to the most unfavorable presumptions. He has unquestionably betrayed his trust, and the court is bound to apply to him the maxim *in odium spoliatoris omnia præsumentur*. If a person is proved to have destroyed a written instrument, a presumption arises that if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance, and accordingly slight evidence of the contents of the instrument will usually in such a case be sufficient."

If a party having charge of the property of others so confounds it with his own that the line of distinction can not be traced, all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it. If it be a case of damages, damages are given to the utmost value that the article will bear.² So a party wilfully mixing his goods with those of another person is bound to prove which are his.³

¹ *Landis v. Scott*, 32 Pa. St. 498 (1859).

² *Hart v. Ten Eyck*, 2 Johns. Ch. 108 (1816); *Eyder v. Hathaway*, 21 Pick. 208 (1833).

³ *Loomis v. Green*, 7 Me. 386 (1831). Several cows belonging to different owners break into a private garden and do damage. The presumption is that each cow did an equal amount of damage. *Partenheimer v. Van Order*, 20 Barb. 479 (1855).

In international law the principle of the maxim is carried very far. "It is certain," said Sir William Scott in *The Hunter*,¹ "that by the law of every maritime court of Europe, spoliation of papers not only excludes further proof, but does *per se*, infer condemnation, founding a presumption *juris et de jure*, that it was done for the purposed of fraudulently suppressing evidence which if produced would lead to the same result; and this surely not without reason, although the leniency of our code has not adopted the rule in its full vigor, but has modified it to this extent that if all other circumstances are clear, this circumstance alone shall not be damnatory, particularly if the act were done by a person who has interests of his own that might be benefited by the commission of this injurious act. But though it does not found an absolute presumption *juris et de jure*, it only stops short of that, for it certainly generates a most unfavorable presumption. A case which escapes with such a brand upon it, is only saved so as by fire. There must be that overwhelming proof arising from the concurrence of every other circumstance in its favor, that forces a conviction of its truth in spite of the powerful impression which such an act makes to its entire reprobation." In the subsequent case of *The Johanna Emelie*,² Dr. Lushington stated the rule in the English admiralty courts more particularly. "It has been said," said he, "that the master is entirely discredited by various circumstances and the fact principally relied on in the circumstance of his having denied that there was any spoliation of papers. I must say a word as to the spoliation of papers generally before I apply myself to the fact. I do not know that there is to be found in any of Lord Stowell's judgments any direct definition of the word "spoliation." I am of opinion that the mere destruction of papers is not under all circumstances to be considered a spoliation; I say under all circumstances, because it might be carried to a

¹ 1 Dods. Adm. 480 (1815).

² 18 Jar. 708 (1855).

very absurd length. I apprehend it might be said, if at any time during a long voyage the master destroyed papers that had no relevancy to it relating to a former voyage, the matter would not be put in issue. To say that was a spoliation of papers would be going the length of saying that nothing in the nature even of a private letter was to be destroyed after the vessel had left her port. I am not, however, disposed to relax the practical effect of the rules laid down by Lord Stowell, because they are consistent with good sense, and with justice to all parties; but they must not be pressed beyond his true intention with reference to all the facts of the case.¹ * * * In *The Rising Sun*,² Lord Stowell lays down the doctrine that spoliation does not enure to condemnation; with other suspicious circumstances, it shuts the door against further proof. To that doctrine I entirely assent." The English and not the continental rule³ is the law of the United States. "Concealment or even spoliation of papers," said Mr. Justice Story in *The Pizarro*,⁴ "is not of itself a sufficient ground for condemnation in a prize court. It is undoubtedly a very awakening circumstance, calculated to excite the vigilance and justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity or superior force; and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile; if the cause labor under heavy suspicions, or there be a vehement presumption of bad faith or gross prevarication, it is made the ground of the denial of further proof, and condemnation ensues from defects in the evidence which the party is not permitted to supply."

¹ Citing *The Hunter*, 1 Dods. Adm. 480; *The Two Brothers*, 1 Rob. Adm. 131; *The Polly*, 2 Rob. Adm. 361.

² 2 Rob. Adm. 104.

³ See note 2 Wheat. 241.

⁴ 2 Wheat. 241 (1817).

RULE 25. — The fact of spoliation standing alone may defeat a claim, but of itself can not sustain a claim.

Where the spoliator is the claimant, the fact of spoliation *alone* raises a presumption against his claim. Thus in *Askew v. Odenheimer*¹ it was said: "We may take the rules of evidence to be well established that where a deed, a will, or other paper is proved to be destroyed or suppressed, or there is vehement suspicion of its having been done, the presumption *in odium spoliatoris* applies in favor of the party who claims under such paper, though the contents are not proved. The fact of spoliation, suppression, or embezzlement may be proved by the answer or oath of the opposite party. So may the contents of the paper; the same rule applies to matters of account; the mere embezzlement of books of account is sufficient to authorize a rejection of claims by the spoiler though supported by evidence, or the party spoiled may rebut the claim by his oath."

But where it is sought to charge the spoliator, some evidence besides the mere fact of spoliation is necessary; in other words, the suppression or destruction of the evidence does not relieve the opposite party from the burden of proving his own case.² "I do not remember or believe," said the Master of the Rolls in *Cowper v. Cowper*,³ "that there has been any case where there was not some proof made of the existence of the deed or writing supposed to be suppressed or destroyed." "All cases for relief against spoliation come," said Lord Hardwicke, in *Saltern v. Melhush*,⁴ "in a favorable light, but notwithstanding the rule that things are to be taken *in odium spoliatoris*, yet it ought to have no other consequence but this, that where the contents of the deed destroyed are proved, the party shall have the same benefit as he would if the deed itself was pro-

¹ 1 Bald. 390 (1168).

² *Bott v. Wood*, 56 Miss. 136 (1878).

³ 2 P. Wms. 748 (1734).

⁴ Amb. 248 (1754).

duced." In *Askew v. Odenheimer*¹ it was said: "But when he comes to charge the spoiler in account, in order to raise a debt against him, he must give some evidence beyond the fact of spoliation, his oath would be admissible in evidence, its effect depending on the circumstances of the case. If he relies on other evidence he must make out a *prima facie* case by proof competent for a court of equity to presume a court of law to give a judgment on a demurrer to the evidence, or a jury to find a verdict in favor of the charge set up. This is what is understood by *some evidence*, it may be slight, yet if it conduces to prove the charge it is legally sufficient, its weight or credibility is a matter of discretion and circumstance. No specific sum can be charged against the spoiler on proof of the mere fact of spoliation; herein the rule differs from that which applies to a claim of property under a deed or will on which the right depends and the thing claimed is ascertained."² This doctrine has been considered at greater length under a previous rule (Rule 23), in discussing the presumption arising from the withholding of evidence.

In *Bott v. Wood*³ the court say: "The principle of the maxim *omnia præsumentur in odium spoliatoris*, as applicable to the destruction or suppression of a written instrument is that such destruction or suppression raises a presumption that the document would if produced militate against the party destroying or suppressing it, and that his conduct is attributable to this circumstance, and therefore slight evidence of the contents of the instrument will usually in such a case be sufficient. There is great danger that the maxim may be carried too far. It can not properly be pushed to the extent of dispensing with the necessity of other evidence and should be regarded as mere matter of inference, in weighing the effect of evidence in its own nature applicable to the subject in dispute."

¹ *Supra*.

² *Askew v. Odenheimer*, 1 Bald. 390 (1831).

³ 56 Miss. 126 (1878).

RULE 26. — But the presumption in disfavor of a spoliator does not arise where the document concealed or destroyed is otherwise proved in the case (A) or the spoliation is open and for cause (B).

Illustration.

A.

I. The contents of a paper are proved by witnesses. The paper is withheld by the custodian. No presumption arises against him.

In *Bott v. Wood*,¹ it was said: "The doctrine is that unfavorable presumption and intendment shall be against the party who has destroyed an instrument which is the subject of inquiry in order that he may not gain by the wrong. But where there is express and positive evidence, there is no place for presumption or inference. It is only in reference to the contents of a paper destroyed or withheld that the maxim can have application, and where the contents are proved there is no occasion for resort to the maxim. In this case, if the evidence of B. was sufficient to satisfy the jury as to the terms of the will in dispute, a resort to the maxim under consideration was unnecessary."

B.

1. In an action of ejectment the defendant, John Coyle, claimed under a contract to purchase from Phillip Coyle and Mary his wife. There was no evidence that the contract had been acknowledged by the wife as required by law; but it remained in her possession until destroyed by her in the presence and with the assent of both her husband and the defendant. This destruction did not raise the presumption that it had been properly acknowledged by the spoliator.²

"Conceding," said Lewis, C. J., in case I., "that the destruction of the article was unauthorized, it is clear that without an acknowledgment by Mary Coyle according to law it could have no legal operation against her or her heirs after the death of her husband. There was no secret

¹ 56 Miss. 126 (1878).

² *Milttenberger v. Coyle*, 27 Pa. St. 170 (1856).

act of spoliation. All parties in interest were present and John Coyle was sent for specially on the occasion. His acquiescence may be inferred from his omission to make opposition by word or deed. There is, therefore, nothing to authorize a presumption that the article had been acknowledged by Mary Coyle separate and apart from her husband."

The presumption does not extend beyond the thing taken or suppressed. In *Harris v. Rosenberg*,¹ the defendants entered the store of the plaintiff and carried off a quantity of different kinds of goods. The proof not being definite as to the quantity and value of the goods taken, the trial court ruled that the largest quantity and the highest value were to be taken as the true measure. On appeal, this was held erroneous. "As we construe the finding," said Loomis, J., "in connection with the fact that judgment was rendered for all the plaintiff demanded in his writ, the principle of presuming the highest value and the largest quantity does not seem to have been limited to the precise thing or things otherwise proved to have been taken. * * * A proper application of the rule to the case at bar may be illustrated as follows: If it was proved that the defendants took a piece of silk, and the plaintiff claimed that it was of the best quality and highest price and contained so many yards, and the defendant, while denying the alleged quantity, quality, and price, would not produce it in court or allow it to be examined and measured, it would furnish a very strong inference against him; but the fact of taking the silk would not of itself justify the court in presuming that he took the fur caps or other things mentioned in the declaration, and that they also were of the finest quality and highest price. The presumption we are considering is, of course, to be distinguished from one arising from opportunity to take the goods, coupled with other circumstances calculated to fasten

¹ 43 Conn. 237 (1875).

the guilt upon the defendants; as, for instance, if certain goods were known to have been in the store just previous to the defendants' entry, and were found missing soon after, and no persons other than the defendants and those acting with them were known to have entered the store without permission or to have had opportunity to take the goods, the court might properly infer that the missing goods went off by the same hands that were proved to have taken a part." Therefore, before the presumption can arise it should be clearly proved that the document destroyed by the party was the one alleged.¹

The presumption of course is not conclusive. In *Thompson v. Thompson*,² the court instructed the jury as follows: "If the jury believe from the evidence that the plaintiff burnt or in any way destroyed any of the papers of the deceased, without the knowledge and consent of those who were interested in the estate of said deceased it devolves on him to show by proof other than his own statements what those papers contained; and on his failure to do so, the law raises the presumption against him that they were of the highest value to the defendant in this suit, and entitles her to a verdict." In the Supreme Court on appeal it was said: "It is undoubtedly true that a party who destroys the evidence by which his claim or title may be impeached raises a strong presumption against the validity of his claim. And if the plaintiff destroyed papers of the estate, and especially receipts for taxes, which are important documents, involving in many instances the validity of a title, he committed a great wrong; but yet the presumption against him would not be of that conclusive character indicated by the instruction. The jury were told in effect that if the plaintiff destroyed any papers of the deceased, the defendant was entitled to a verdict. The law of nations as recognized in Continental Europe, under certain circumstances, raises a conclusive presumption against the spoliator of

¹ *McReynolds v. McCord*, 6 Watts, 238 (1837).

² 9 Ind. 323 (1837).

papers indicating the national character of a vessel; but even that rule does not ordinarily prevail in England and the United States. This rule has no place in the courts of the common law. On proof of the existence of a paper the testimony of a party who ought to have the custody of it touching its loss, with evidence of diligent search for it is addressed to the court. If its loss is established he is allowed to go to the jury with evidence of its contents. But his adversary may prove that he has withheld or destroyed it, and if he satisfactorily establish that point, every presumption will be indulged against him in reference to its character."

RULE 27. — The voluntary destruction of a document raises *prima facie* a presumption of fraud, and precludes the spoliator from giving secondary evidence of its contents, in the absence of a legal excuse for its destruction.

Illustrations.

I. A. sues on a note which he alleges B. gave him, but which note he has burnt up. A. can not prove his alleged debt.¹

II. An action is brought for a libel contained in a letter written by B. to a woman to whom J. was at the time engaged to be married. On the trial J. testified that the day before his marriage he burned the letter and had no copy. He can not be allowed to repeat the contents from memory.²

III. A party has mutilated a paper by tearing off a writing attached to it. He can not prove its contents by parol.³

In case I. it was said: "The proof is that the plaintiff deliberately and voluntarily destroyed the note before it fell due and there is nothing in the case accounting for or affording any explanation of the act, consistent with an honest or justifiable purpose. Such explanation the plaintiff was bound to give affirmatively, for it would be in viola-

¹ *Blade v. Noland*, 12 Wend. 173 (1834).

² *Joannes v. Bennett*, 5 Allen, 169 (1863).

³ *Price v. Tallman*, 1 N. J. (L.) 447 (1794).

tion of all the principles upon which inferior and secondary evidence is tolerated to allow a party the benefit of it who has wilfully destroyed the higher and better evidence, * * * I believe no case is to be found where, if a party has deliberately destroyed the higher evidence without explanation showing affirmatively that the act was done with pure motives and repelling every suspicion of a fraudulent design, that he has had the benefit of it. To extend it to such a case would be to lose sight of all the reasons upon which the rule is founded and to establish a dangerous precedent. We know of no honest purpose for which a party, without any mistake or misapprehension, would deliberately destroy the evidence of an existing debt, and we will not presume one. From the necessity and hardship of the case, courts have allowed the party to be a competent witness to prove the loss or destruction of the papers; but it would be an unreasonable indulgence, and a violation of the just maxim, that no one shall take advantage of his own wrong to permit this testimony when he has designedly destroyed it."

In case II. it was said: "This (permitting the secondary evidence) we think a violation of the cardinal principle that where it appears that a party has destroyed an instrument or document the presumption arises that if it had been produced it would have been against his interest or in some essential particular unfavorable to his claims under it. *Contra spoliatorem omnia præsumuntur*. In the absence of any proof that the destruction was the result of accident or mistake or of other circumstances rebutting any fraudulent purpose or design, especially where, as in the case at bar, it appears that the paper was voluntarily and designedly burned by the party who relies on it in support of his action, the inference is that the purpose of the party in destroying it was fraudulent, and he is excluded from offering secondary evidence to prove the contents of the document which he has by his own act put out of existence. If such were not the rule, and a party could be permitted

to testify to the language or purport of written papers which he had wilfully destroyed in support of his right of action against another, great opportunities would be afforded for the commission of the grossest frauds. A person who has wilfully destroyed the higher and better evidence ought not to be permitted to enjoy the benefit of the rule admitting secondary evidence. He must first rebut the inference of fraud which arises from the act of a voluntary destruction of a written paper, before he can ask to be relieved from the consequences of his act by introducing parol evidence to prove his case."

RULE 28. — That the destruction was the result of mistake, accident, or some fault not amounting to a fraud, furnishes a "legal excuse" within Rule 27.

Illustrations.

I. A. receiving the amount of a promissory note in bills, destroys the paper. He afterwards discovers that the bills are forgeries. In an action on the note, A. may give evidence of its contents.¹

II. B. destroys a note thinking that it is a receipt. In an action thereon B. may give secondary evidence of the contents of the note.²

III. T. sues S. for breach of promise of marriage. Letters from S. to T. containing the offer of marriage have been destroyed by T. on the advice of a sister that they would not be needed. T. is allowed to prove their contents.³

Formerly secondary evidence of a document not produced at the trial was allowable only where the writing had been destroyed by inevitable accident, or was withheld by the opposing party.⁴ But in late years this rule has been relaxed, and it is now only necessary to prove that his incapacity to produce it is not attributable to a positive fault involving a fraud.⁵ The naked fact of a voluntary destruc-

¹ See *Riggs v. Tayloe*, 9 Wheat. 487 (1824).

² *Id.*

³ *Tobin v. Shaw*, 45 Me. 344 (1858).

⁴ *Villars v. Villars*, 2 Atk. 71. Opinion of Chancellor Lansing in *Livingston v. Rogers*, 2 Johns. Cas. 488 (1802).

⁵ *Livingston v. Rogers*, *Id.*; *Jackson v. Woolsey*, 10 Johns. 483 (1814).

tion of a document raises such a presumption of fraud as to preclude all secondary evidence of its contents by the spoliator.¹ Therefore, one who has voluntarily destroyed written evidence will not be permitted to give secondary evidence of it until he has in some way — as by showing that it was done by mistake or accident — repelled the inference of fraud arising from the destruction.

“When the plaintiff,” said the court in case III., “was induced to suppose that her letters from the defendant would not be used in a trial of a suit against him in her favor, and she yielded to the advice of a sister in whom she had reposed unlimited confidence that it would be desirable that they should not be exposed to the perusal of those who would read them, in her opinion, to gratify a feeling of curiosity, unmingled with any sympathy for her; perhaps, too, from a wish not to be reminded by their existence of what she, at the time of their receipt, regarded as a pledge of affection, followed by the unwilling conviction, from his coldness at least, so wounding to her sensibility, that a change had taken place in him in regard to herself, or that he was always untrue, can it be said that this is a case so unlike that when a loss of writing has occurred by accident or mistake, that the contents of such letters can not be shown by oral testimony when they have been destroyed. May not her acts in committing them to the fire be treated as a misapprehension, an accident, a misfortune?”

Where one person deprives another by fraud of the possession of written instruments which belong to him, the latter may bring suit on them, and may give secondary evidence of their contents.²

¹ *Bagley v. McMickle*, 9 Cal. 449 (1858); *Speer v. Speer*, 7 Ind. 178 (1855); *Wilson v. Cassidy*, 3 Ind. 562; *Parker v. Kane*, 4 Wis. 1 (1855); *Broadwell v. Stiles*, 8 N. J. (L.) 58 (1824); *Blake v. Fash*, 44 Ill. 304 (1867); *Henderson v. Hoke*, 1 Dev. & B. 119. (1836).

² *Grimes v. Kimball*, 3 Allen, 518 (1862); *Almy v. Reed*, 10 Cush. 421; *Hedge v. McQuaid*, 11 Cush. 352.

PART III.

PRESUMPTIONS OF CONTINUANCE AND UNIFORMITY.

CHAPTER VIII.

THE PRESUMPTION OF THE CONTINUANCE OF THINGS GENERALLY.

RULE 29. — Possession or ownership of either realty or personalty (A), non-possession or loss (B), debts (C), and other conditions of property or things (D), once proved to exist, are presumed to continue until the contrary is shown.¹

Illustrations.

A.

I. It is proved that at a given time B. was seized of certain land. The presumption is that such seizure continues and the burden is on him who alleges a disseisin.²

II. Certain land is devised to executors with power to sell. If no conveyance from them is shown, the presumption is that they did not execute the power.³

III. It is proved that a promissory note was given for consideration on November 2, 1848. In an action brought in 1854, the note is not produced, on the ground that it is missing and can not be found after diligent search. Secondary evidence of the note may be given, for the presumption is that it still exists unpaid.⁴

A note once proved to have existed, it was said in case III., is presumed to exist still, unless payment be shown or

¹ Gould v. Norfolk Lead Co., 9 Oush. 338 (1869); Garner v. Green, 8 Ala. 96 (1845); Kidder v. Stevens, 60 Cal. 415 (1892).

² Brown v. King, 5 Metc. 173 (1849); and see Sullivan v. Goldman, 19 La. Ann. 12 (1867); Leport v. Todd, 33 N. J. L. 128 (1866); Currier v. Gale, 9 Allen, 522 (1865); Rhone v. Gale, 19 Minn. 54 (1868); Gray v. Finch, 23 Conn. 513; Winkley v. Kaime, 33 N. H. 268 (1855); Pickett v. Packham, L. R. 4 Ch. App. 190 (1868); Smith v. Hardy, 36 Wis. 417 (1874); Harriman v. Queen Ins. Co., 49 Wis. 71 (1890); U. S. v. De Coursey, 1 Pinney (Wis.) 508 (1845); Hanson v. Chitovitch, 13 Nev. 895 (1878); Hunter v. Bennett, 15 La. Ann. 715 (1860).

³ Jackson v. Potter, 4 Wend. 673 (1830).

⁴ Bell v. Young, 1 Grant's Cas. 175 (1854).

other circumstances from which a stronger counter presumption arises. It is not necessary for the creditor to prove that the debt is not paid or discharged. The burden of showing that it is rests on him who alleges it. And when diligent search has been made, unsuccessfully, by the person in whose hands the law presumes it to be, it is in judgment of law a lost paper, and secondary evidence is admissible of its contents."

Where a person is proved to be the owner of personal property with the present right of possession, the presumption is that he continues to be owner with the right of possession, until there is evidence that he has parted with that ownership or right of possession, and the mere fact that the property is in the possession of another, with his consent, does not raise a legal presumption of change of title so as to shift the burden of proof upon the original owner to show that he retains his right of property and his right of possession therein.¹

Whenever the possession of one person is once shown to have been in subordination to the title of another, it will not be adjudged afterwards adverse to such title, without clear and positive proof of its having distinctly become so; for every presumption is in favor of the possession continuing in the same subordination to the title.²

B.

I. In an action of replevin, it is proved that a tenant was evicted from his possession. The presumption is that he continues out of possession.³

II. The question is the admissibility of secondary evidence of a document. It is proved that two years ago diligent search was made for the document, but it could not be found. The presumption is that it is still lost, and secondary evidence is admissible.⁴

¹ Wells, C. J., in *Magee v. Scott*, 9 Cush. 148 (1851).

² *Hood v. Hood*, 2 Grant's Cas. 229 (1858).

³ *Saunders v. Springsteen*, 4 Wend. 429 (1830).

⁴ *Poe v. Darrah*, 30 Ala. 289 (1853).

C.

I. A statute authorizes the issuance of an attachment upon the filing of an affidavit showing the existence of the debt, etc., at the time of the application. An affidavit is made on October 5th, showing a debt, etc., on that day, but it is not filed till October 16th, when the attachment is applied for. The presumption is that the debt is unpaid on the 16th, and the attachment is properly issued.¹

II. A debt was due from A. to B., in January, 1866. In November, 1865. A. admits the debt, and in 1867 B. brings suit for it. The presumption is that the debt is still due.²

III. To prove a debt against a bankrupt, an entry in his books some months before the bankruptcy showing that he was indebted to the claimant in a certain sum is proved. The presumption is that the debt still continues.³

In case I. it was said: "The affidavit having shown the debt to be existing and past due on the 5th of October, the legal presumption would follow that it remained due on the 16th of October. If a debt was shown to exist, but not due, after the day of its falling due, there might perhaps arise a legal presumption that the debtor had complied with his contract and paid as per agreement. But when it is once established that there has been a breach of contract, and the debtor has failed to pay at the right time, we are induced to think there is a fair legal presumption arising that the debt continues due and unpaid until something is shown to the contrary, or there is such lapse of time as to raise a contrary presumption."

In case II. it was argued that the presumption was that the debt was paid when it became due. But the court said: "The fact that the debt had not become payable at the time the defendant admitted its existence does not take the case out of the general rule. Payment being an affirmative fact to be done or performed by the defendant was for the defendant to prove."

The payment of a debt is evidenced by a receipt under

¹ O'Neil v. New York, etc., Mining Co., 3 Nev. 141 (1867).

² Farr v. Payne, 40 Vt. 615 (1868).

³ Jackson v. Irvin, 2 Camp. 48 (1809).

seal — which is conclusive, making an estoppel — or a simple receipt which is *prima facie* evidence and rebuts the presumption of the continuance of the debt. Other circumstances which render the payment probable may also rebut the presumption — as for example, the settlement of accounts between the parties subsequent to the accruing of the debt, in which settlement no mention of the debt is made,¹ or a receipt for subsequent debts.²

D.

I. Goods are delivered in a good condition to A., a carrier, who delivers them at the end of his route to B., another carrier. At the end of B.'s route they are discovered to be damaged. In an action against B. the presumption is that he received them in good condition and the burden is on him to show that he did not.³

II. A box containing several pieces of cloth addressed to Fon du Lac, Wis., was delivered at Jamestown, N. Y., to the Atlantic and Great Western R. Co. This carrier transported it to Mansfield, Ohio, and delivered it to the Pittsburg and Ft. Wayne R. Co., who carried it to Chicago and delivered it to the Chicago and North Western R. Co., who carried it to Fon du Lac. When the box was opened at its destination several pieces of the cloth were missing. There was no proof in whose hands the box was when the theft occurred. In an action against the Chicago and North Western R. Co. for the value of the missing pieces, *held*, the box being found to be intact when it was delivered to the first carrier, the presumption is that it continued so, until the contrary is shown, and the defendant (the last carrier) is liable.⁴

III. A vessel is proved to be seaworthy (as to chains, cables, etc.), when she left port in June, 1835. On December 15th she is wrecked, and arrives in port December 24th without sufficient cables, etc. The presumption is that she was sufficiently equipped on December 15th.⁵

IV. A guest sues an inn-keeper for the loss of packages containing money and securities of great value, which he had given, sealed in an envelope, to his clerk, to be deposited in the safe. The inn-keeper denies that the envelope contained that amount of money. It is proved that shortly before that time the guest was seen with this money in his possession. The presumption is that the guest had such money at the time he alleged he had given it to the clerk.⁶

¹ Coisell v. Budd, 1 Camp. 27.

² Best Ev. sec. 406; see *post*, Cap. XV.

³ Smith v. New York Central R. Co., 43 Barb. 235 (1864).

⁴ Laughlin v. Chicago, etc., R. Co., 28 Wis. 204; 9 Am. Rep. 428 (1871).

⁵ Martin v. Fishing Ins. Co., 20 Pick. 389 (1838).

⁶ Wilkins v. Earle, 44 N. Y. 172 (1870).

V. It is shown that a decree in chancery was rendered at a certain time. There is no evidence that it has been reversed or annulled. The presumption is that it is still in force.¹

VI. The question is whether a certain custom existed in the year 1840. The jury finds that the custom existed in 1689, without more. The presumption is that the custom exists in 1840.²

“The property,” as was said in case I., “was placed in the hands of the Western Railroad Company in good order and condition, and until the contrary is shown must be presumed to have continued in that condition while in the possession of that company. It was delivered by the defendant after being transported over its road from Albany to Rochester, in a damaged condition, and the further presumption naturally follows that it received the injury while in the possession of the defendant. The general rule is that things once proved to have existed in a particular state, are to be presumed to have continued in that state, until the contrary is established by evidence either direct or presumptive. Unless the rule is to be applied to goods delivered, to be transported over several connecting railroads, there would be no safety to the owner. It would often be impossible for him to prove at what point, or in the hands of which company, the injury happened. But give to such party the benefit of the presumption that the goods he has delivered in good order in such case continued so until they came to the possession of the company which delivers them at the place of destination in a damaged condition, and his rights will be completely protected. The burden is then shifted upon the latter company, of proving that such goods came to its possession in a damaged condition, by way of defense. This proof the latter company can always make, much more easily and readily than the converse can be proved by the owner.”

In case II. it was said: “What presumption is to be indulged against the Chicago and Northwestern Company so

¹ *Murphy v. Orr*, 23 Ill. 469 (1863). But see *Bacon v. Smith*, 2 La. Ann. 441 (1847).

² *Scales v. Key*, 11 Ad. & Ell. 519 (1846).

as to charge that company with liability for the loss. It is manifest that the recovery against it can not be sustained without the aid of presumption of some kind. To maintain their action the plaintiffs must show, either by direct evidence of the facts themselves, or by legitimate and proper inference from other facts proved, *first*, that the cloths which are the subject of suit were in the custody of the defendant as a common carrier, for transportation over its road; and *secondly*, while in the custody of the defendant they were lost. These two facts, either by direct proof or by legal and proper inference or presumption, must have been established, or the verdict can not be sustained. The direct proof is wholly wanting. No one knows or can say with any certainty whatever, that the cloths ever came into the possession of the defendant at all. The most that can be said, as a mere natural inference from the facts proved, is, that they *might* have come into its possession, and so have been lost or stolen while in its custody. As a mere natural inference or presumption of fact to be drawn or indulged by the jury, it is the slightest and weakest possible, if, indeed, there exists any foundation for it. And I do not see that there is any foundation, according to Mr. Starkie's definition of natural presumptions of *mere fact*. If there be a presumption, therefore, upon which the defendant is to be held liable, it must be of the second class spoken of by that learned author, namely, '*legal presumptions made by a jury; or presumptions of law and fact.*'¹ Does such legal presumption exist in this case? The presumption claimed and relied upon is, that a particular state of things being once proved, that state is presumed to have continued until the contrary is established by evidence, either direct or presumptive. The position is that the cloths being proved to have been in the boxes at the time of their delivery to the Atlantic and Great Western Railway Company, the presumption of law is that they

¹ Welch v. Sackett, 12 Wis. 257; Graves v. State, Id. 593.

continued therein until the boxes came to the possession of the defendant, unless the contrary be shown, the burden of which rests upon the defendant. The existence of a presumption of this kind in certain cases is not denied, but the point is upon its applicability here. If the plaintiffs had brought their suit against the Atlantic and Great Western Company, could that company have escaped liability on the ground of such presumption? And so, if the Pittsburg and Fort Wayne Company had been sued, could it have avoided responsibility on the same ground? Could both these companies have exonerated themselves and imposed liability for the loss exclusively upon the defendant, when there was no more evidence of the loss having occurred while the boxes were in the custody of the defendant than when in the custody of either of themselves? If those companies could have done so then it must have been upon some technical application of the doctrine of presumption — upon a presumption which is artificial rather than natural, and is raised and sanctioned by the law from motives of necessity or policy to give certainty to the remedy and prevent a failure of justice in such cases. As the common carrier next in order, the defendant was bound to receive and transport the boxes when tendered. It had no means of investigation or inquiry into their contents. It had no right to open the boxes or examine what they contained and if it had, could not have detected the loss by such examination, and so have refused to receive and carry. It must take the boxes as they were with no external signs or appearances of breaking or injury, and nothing to give warning that the cloths had been previously abstracted or removed and carry them forward to their place of destination. Under these circumstances, the rule or presumption of law which makes the defendant liable for the value of the goods unless (what seems quite impossible to be done), it shows where the loss actually took place, must be supported by most clear and satisfactory reasons of policy or necessity, or otherwise it should be rejected. It

must be shown that greater injustice or more certain injustice will ensue from its rejection, than will or may follow from its adoption. I have been, as I have said, in very considerable doubt; but examination convinces me that there are such reasons and that both the principle and authority sustain the presumption. The very uncertainty which exists as to when and where the cloths were taken out, or in whose custody the boxes then were and the difficulty or impossibility of ever ascertaining those facts, make the presumption absolutely necessary. What is difficult or impossible for the defendant to find out with respect to the breaking and larceny is still more difficult or impossible for the plaintiffs. The defendant possesses means and facilities which the plaintiffs do not. To say that the plaintiffs shall not recover because they have not ascertained and proved that the cloths were taken while the boxes were in the custody of the defendant is, in effect, to say that they are without remedy in the law for their loss. If required to make such proof to establish a cause of action against this company, then the same proof would be required in a suit against either of the others, and the plaintiffs could not recover against any although it is certain that one of them is or should be responsible for the loss. If the plaintiffs knew or could prove in whose custody the boxes were when the cloths were taken, there would be no hardship perhaps in requiring them to sue that company. But the plaintiffs do not know, nor is it possible for them to ascertain this, and unless aided by presumption, they are without remedy, which is a positive and certain injustice. I know of no more reasonable or proper presumption to apply than that here invoked. In fact, I know of no other fitted to the facts and circumstances of the case. It is true the defendant may not be the company which ought in very fact to be visited with the consequences of the loss, but it is at the same time true that it *may* be such company. The cloths may have been taken while the boxes were in its custody. It is not certain that they were not, and there-

fore not certain that injustice has been done the defendant. On the other hand, the wrong and injustice done the plaintiffs, if they are dismissed without remedy, are certain. They are no matter of doubt or speculation. If there were no redress in such case, it could no longer be the boast of our law that there is no wrong without its remedy, and the strict liability of common carriers, whenever two or more are associated in the transportation, or connected in the line or route, would be at an end. It would be far more in harmony with the rules of the common law respecting such liability, that any or all of the carriers so associated, or whose lines or routes connect, and who have had possession of the goods should be held liable, at the option of the owner or consignee in such case, than that none of them should be. And the reasons for adhering to those rules of the common law probably exist at the present day quite as much as ever; and by some they are thought to be even more cogent. The difficulties, nay even impossibilities, by which owners would be beset, if put to the task of ascertaining where their packages or boxes were broken open and constantly plundered when in transit over our long routes are well known and are illustrated by the facts of this case."

"When you prove," it was said in case IV., "that shortly before the 20th of April, the plaintiff had in his possession the particular drafts which he claims to have deposited, and the particular bills of \$1,000 and \$100 which he also claims to have deposited, some links in the chain are furnished. Their strength depends upon their nearness and relation to the transaction. If A., at seven o'clock, had seen this envelope, and its contents with the plaintiff, and B., at five minutes past seven, had seen him make the deposit, I think the two could, by the inference of the jury, be connected together, although there was an interval when he was not within the sight of either. There is a legal presumption of continuance. A partnership once established is presumed to continue. Life is presumed to exist.

Possession is presumed to continue. The fact that a man was a gambler twenty years since justifies the presumption that he continues to be one. An adulterous intercourse is presumed to continue. So of ownership and non-residence. This analogy is fairly applicable to the present case and justifies the admission of this evidence."

"The finding of the jury," said Lord Denman in case VI., "that the custom had existed since 1689, was the same in effect as if they had found that it had existed till last week, unless something appeared to show that it had been legally abolished."

RULE 30. — Domicil, residence or non-residence (A), solvency or insolvency (B), infancy (C), partnership (D), the holding of an office (E), authority to do an act (F), and other relations or conditions of persons or things (G), once shown to exist, are presumed to continue until the contrary is proved.

Illustrations.

A.

I. An action is brought in Arkansas, in 1841, by B. against P. It is proved that P. resided, in 1824, in Indiana. The presumption is that P. still resides there.¹

II. B., an inhabitant of the town of G., Massachusetts, conveyed his farm on April 1st, and on the 27th of that month went with his family to his brother's, in the town of T., where he remained until several days after May 1st, returning then to G., and removing on the 27th of May to Illinois. The presumption is that B. had not changed his domicil in G., on May 1st.²

III. To except an action on a contract from the bar of the Statute of Limitations it is necessary to prove that the defendant was a non-resident at the commencement of the suit. It is proved that he was a non-resident at the time the contract was made. The presumption is that he continued a non-resident, and throws the burden on him to show that he

¹ *Prather v. Palmer*, 4 Ark. 456 (1841); *Inhabitants v. Inhabitants*, 6 Allen, 508 (1863); *Eaton v. Woydt*, 26 Wis. 383 (1870); *Rixford v. Miller*, 49 Vt. 319 (1877); *Greenfield v. Camden*, 74 Me. 56 (1882); *Daniels v. Hamilton*, 52 Ala. 106 (1875).

² *Kilburn v. Bennett*, 3 Metc. 199 (1841).

has been within the State a sufficient length of time to create a bar under the statute.¹

IV. Evidence by deposition is allowed to be taken where the witness is more than thirty miles of the place of trial, and unable to attend court. Before the trial the deposition of H. is taken for this cause. Subsequently when it is offered on the trial, it is alleged that H. is now in town, and able to attend. The burden of proving this is on the party alleging this.²

"It is necessary," said Lord Westbury in a leading English case, "in the administration of the law, that the idea of domicile should exist and the fact of domicile should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of the domicile. Domicil, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place."³

And Lord Cranworth added: "It is necessary to bear in mind that a domicile, though intended to be abandoned, will continue until a new domicile is acquired, and that a new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but until also this intention has been carried out by actual residence there."⁴

B.

I. A. is proved to be in solvent circumstance on a certain day. A. is presumed to continue solvent until the contrary is proved.⁵

¹ *State Bk. v. Sewell*, 18 Ala. 616 (1861).

² *Brown v. Burnham*, 28 Me. 38 (1848).

³ *Bell v. Kennedy*, L. R. 1 Sc. App. 320 (1868).

⁴ And see as to the presumption of continuance of domicile, residence, and non-residence, *Daniels v. Hamilton*, 52 Ala. 105 (1875); *Walker v. Walker*, 1 Mo. (App.) 404 (1876); *Nixon v. Palmer*, 10 Barb. 175 (1850); *Church v. Rowell*, 49 Me. 367 (1861); *Littlefield v. Inhabitants*, 50 Id. 475 (1862); *Goldie v. McDonald*, 79 Ill. 606 (1875).

⁵ *Walrod v. Ball*, 9 Barb. 271 (1850).

II. An action is brought on a promissory note and it is proved that the maker was insolvent at its maturity. The presumption is that he was insolvent when the action was brought.¹

III. It is proved that A. was bankrupt on August 31st. The presumption five months later is that he continues so.²

C.

I. A. brings an action in his own name to cancel a deed executed during his infancy. There is no allegation that he has attained his majority before commencing the action. The presumption is that A. is still an infant.³

II. In a settlement case, it is proved that a son is over age. It is nevertheless presumed that he continues unemancipated as in the days of his infancy, unless there is evidence to the contrary.⁴

“The counsel for plaintiff claims,” it was said in case I., “that the presumption of law is that a party commencing his action in court is of full age, and entitled to maintain the action in his own name until the contrary is shown. In most actions this is true, but the case at bar forms an exception. For the whole cause of action in this case is based upon an act done by the plaintiff during infancy, and the plaintiff being in court is compelled to plead that the act was done during his infancy. The age of the plaintiff at the time of the execution of the deed, is not stated, nor is there any thing in the complaint from which the court can infer that the plaintiff has attained his majority. The nature of the relief he seeks requiring the plaintiff after he appears in court to show himself a minor at the time of doing a certain act, the presumption is that such condition continues until the plaintiff himself negatives it.”

¹ *Mullen v. Pryor*, 12 Mo. 307 (1848); *Body v. Jewson*, 33 Wis. 403 (1873).

² *Donahue v. Coleman*, 49 Conn. 484 (1882).

³ *Irvine v. Irvine*, 5 Minn. 61 (1860).

⁴ *Re Lilleshall*, 7 Q. B. 158 (1845).

D

I. A partnership brings an action on a note; it is contended that the plaintiffs are not partners. It is proved that three years previous they were partners. The presumption is that they continue to be so.¹

In case I. it was said: "The evidence of a joint interest in the plaintiffs was sufficient *prima facie*. It was shown that they were partners in business two or three years previous. The witness stated that he had frequently done business with them as partners and had settled with them as such some two or three years since. There was no evidence of any change or dissolution of partnership, and the presumption was that they were still partners."

E.

I. A. is indicted for libelling B. in his capacity of public officer. It is proved that previous to the publication of the libel, B. held a public office. The presumption is that B. continued to hold it at the time of the publication.²

F.

I. The authority of a minor son to bind his father by contract is shown to exist in 1845. A year later the son makes a contract which the father contests. The presumption is that the son had authority to bind him at this time.³

G.

I. A. sues B. for two weeks' board. It is proved that for a year and up to the commencement of these two weeks, B., who was A.'s father, had lived with him, and A. had not claimed any board. The presumption is that the parties were living together during the two weeks on the same terms.⁴

II. In Alabama, in 1855, the stockholders of a corporation are not competent witnesses in an action by or against it. An action is brought by the W. company, and one Y. is offered as a witness. There is evidence that Y. was a stockholder in the W. company in 1850. The presumption is that Y. is a stockholder now, and he is incompetent.⁵

¹ Cooper v. Dedrick, 22 Barb. 516 (1856); and see Anderson v. Clay, 1 Stark. 405 (1816); Clark v. Alexander, 8 Scott N. R. 161 (1844).

² R. v. Budd, 5 Esp. 230.

³ McKenzie v. Stevens, 19 Ala. 692 (1851); Ryan v. Sams, 12 Q. B. 460 (1848).

⁴ Eames v. Eames, 41 N. H. 177 (1860).

⁵ Montgomery Plank Road Co. v. Webb, 37 Ala. 618 (1855).

III. In 1870 a state of peace is proved to have existed in a certain country in 1866. The presumption is that the country is still at peace.¹

III. (a). In 1870 a state of war is proved to have existed in another country in 1860. The presumption is that the country is still at war.²

IV. In 1880 it is shown that a public treaty was in force between A. and E. in 1870. The presumption is that it is still in force.³

V. A certain state of government is proved to have existed a number of years ago in a certain country. The presumption is that that state still exists.⁴

VI. A corporation is shown to have existed at a former date. The presumption is that it still exists.⁵

VII. A. and B. are shown to be living in illicit relations at a previous time. The illicit intercourse is presumed to continue.⁶

VIII. A party's reputation for truth and veracity is shown to have been formerly good. It is presumed to continue good.⁷

IX. It is proved that F. was an unmarried woman at a certain date. The presumption is that she continues so until proved to have married.

X. The common law is known to have been in force in a certain place at a certain date. The presumption is that it continues so until the contrary is shown.⁸

XI. A. is a tenant of a house. A month before her term expires she has no license to sell liquor there. It can not be presumed that she will obtain one before her term ends.¹⁰

XII. B. is indicted for wounding F. so as to "disable" him. The question is whether F. has been "disabled." The evidence is that F. was so badly wounded as to be unable to walk at the time. The presumption is that F. continues in that condition.¹¹

XIII. A suit involving certain property is brought before and heard

¹ *Covert v. Gray*, 34 How. Pr. 450 (1866).

² *Id.*

³ *People v. McLeod*, 1 Hill, 407 (1841).

⁴ *Gelston v. Hoyt*, 1 Johns. Ch. 543 (1845).

⁵ *People v. Manhattan Co.*, 9 Wend. 351 (1832).

⁶ *People v. Squires*, 49 Mich. 487 (1882); *Smith v. Smith*, 4 Paige Ch. 433 (1834); *Cargile v. Wood*, 63 Mo. 501 (1878).

⁷ *Lum v. State*, 11 Tex. (App.) 463 (1882).

⁸ *Page v. Findley*, 5 Tex. 391 (1849).

⁹ *Stokes v. Macken*, 63 Barb. 147 (1861). And we presume, also, that the law remains unchanged in the absence of proof to the contrary. *Stokes v. Macken*, 62 Barb. 149 (1861); *State v. Patterson*, 3 Ired. (L.) 356 (1842); *Isabella v. Pecot*, 2 La. Ann. 387 (1847); *Arayo v. Currell*, 1 La. 540 (1830); *Wilson v. Smith*, 5 Yerg. 379 (1825).

¹⁰ *Kane v. Johnston*, 9 Bosw. 154 (1862).

¹¹ *Baker v. State*, 4 Ark. 56 (1842).

by Judge H. in the year 1868. It is proved that the judge was interested in this property in 1867. The presumption is that he still is interested in it.¹

XIV. An execution issued by the clerk of the court was delivered to the sheriff. The presumption is that it remains there during his continuance in office, unless it is shown to have been returned.²

In case XII. it was said: "Does this evidence support the averment in the indictment that he was thereby disabled, in the sense and meaning of the statute? We think it does. For having proved the effect of the wound, and there being no testimony introduced by the prisoner rebutting this evidence, where the means were in his power, showing that the injury was but temporary, from which the witness had recovered, furnishes a forcible inference against him; and the existence of the disabling having once been proved, its continuance is presumed till proof is given to the contrary. From the fact of a wound having been once given, its nature raises a very strong presumption of its continuance, and that the party did not recover from its effects immediately, and as there is no particular time when the presumption ceases, it still continues."

In case XIII. it was said: "Let us for the argument assume that it was proved that in 1867 the judge owned an interest in the defendant's mine. If he did own an interest at that time, but sold out or abandoned his claim before the commencement of this suit, it would not disqualify him. When a certain state of facts is proved to have existed, the legal presumption is that the same state of things continues to exist until that presumption is rebutted by proof of some counter presumption arising from lapse of time or some other circumstance.

¹ Table Mountain Mining Co. v. Waller's Defeat Mining Co., 4 Nev. 220 (1868).

² Anderson v. Blythe, 54 Ga. 507 (1875). In a North Carolina case it was held that a holograph script was seen among the valuable papers and effects of the decedent eight months before his death, was no evidence that it was found there at or after his death. Adams v. Clark, 8 Jones (L.) 56 (1860)

If it was proved that the judge was interested in defendant's claim in 1867, the legal presumption would arise that he continued interested therein in the year 1868."

"The facts relied on to show custody," it was said in case XIV., were that the *feri facias* was issued in 1861 and handed to the sheriff; that the same sheriff and deputy continued in office during the whole of the year 1862, in which year the judgment was made, and that it was not shown to be in other hands until the following year. The court was requested to charge the jury that in the absence of proof to the contrary, the presumption of law was, that a *feri facias*, issued by the clerk and handed to the sheriff, was in the sheriff's hands until paid, or until shown to have been taken up by the plaintiff or some one else for him. The request was denied. We think that, under all the facts in the record, the court should have given, substantially, the instructions asked for. The doctrine that a state of things once existing is presumed to continue until a change or some adequate cause of change appears, or until a presumption of change arises out of the nature of the subject, is an element of universal law. Without such a principle we could count upon the stability of nothing, and to assure ourselves of a set of conditions at one period of time would afford no ground for inferring the same conditions at any other period. This presumption of *continuance* is a well recognized principle of evidence,¹ and we think its application was rightfully invoked by the counsel in the present case. If this *feri facias* passed regularly from the clerk's office to the sheriff in 1861, and there is no evidence of its return or any other disposition of it until 1863, what is there to point to any other custody but that of the sheriff during the year 1862?"

¹ 1 Greenl., sec. 41.

RULE 31. — Sanity or insanity once proved to exist is presumed to continue. But aliter, as to temporary insanity, produced by drunkenness, violent disease, or otherwise.

Illustrations.

I. The insanity of a person prior to the execution by him of a deed is established. The burden is on the party seeking its validity to show that it was executed during a lucid interval.¹

II. A., in 1860, is shown to have been sane in 1850. The presumption is that he is still sane.²

III. In 1837, H. is inflicted with insanity, resulting from a violent disease. There is no presumption that H. was insane in 1838.³

“Every man being presumed to be sane till the contrary is proved,” it was said in case III., “the burden of proof certainly rests, in the first instance, on the party alleging the insanity. How far this burden is changed by the mere fact of proof of insanity at a particular period, is the precise point of the present inquiry. * * * A careful analysis of the principles upon which presumptions are allowed to have force and effect will show that the proof of the insanity of an individual at a particular period does not necessarily authorize the inference of his insanity at a

¹ Ripley v. Babcock, 13 Wis. 425 (1860); Saxon v. Whitaker, 30 Ala. 237 (1837); Sprague v. Duel, 1 Clarke (N. Y.), 90 (1839); Cartwright v. Cartwright, 1 Phill. 100; Menkins v. Lightner, 18 Ill. 282 (1837); Jackson v. Van Dusen, 5 Johns. 154; Ballew v. Clark, 2 Ired. (L.) 24 (1841); Allen v. Public Administrator, 1 Bradf. 378 (1860); Vance v. Com., 2 Va. Cas. 133 (1818); State v. Spencer, 31 N. J. (L.) 196 (1846); State v. Vann, 82 N. C. 631 (1830); Hadfield's Case, 29 How. St. Tr. 109; McAllister v. State, 17 Ala. 434 (1850); McLean v. State, 16 Id. 672 (1849); Pierce v. State, 53 Ga. 365 (1874); State v. Johnson, 40 Conn. 138 (1873); State v. Brown, 1 Houst. Cr. Cas. 539 (1878); People v. March, 6 Cal. 543 (1856); Atty.-Gen. v. Parnter, 3 Brown C. C. 441; Hall v. Warren, 9 Vesey, 605; Ex parte Holyland, 11 Vesey, 10; White v. Wilson, 13 Vesey, 67; Grabill v. Barr, 5 Pa. St. 441; Hardin v. Hays, 9 Pa. St. 151; Re Gangwere, 14 Pa. St. 417; Gombault v. Public Admr., 4 Bradf. 226; Achey v. Stephens, 8 Ind. 411; Lilly v. Waggoner, 37 Ill. 395; Staples v. Wellington, 58 Me. 453; Puryear v. Rose, 6 Cold. 21; Porter v. Campbell, 58 Tenn. 81; Taylor v. Cresswell, 45 Md. 422; Weston v. Higgins, 40 Me. 102 (1856); Rush v. Megee, 36 Ind. 69 (1871); State v. Willner, 40 Wis. 304 (1876).

² Crouse v. Holman, 19 Ind. 30 (1862).

³ Hix v. Whittemore, 4 Metc. 545 (1842); and see Titlow v. Titlow, 54 Pa. St. 216 (1837); Brooke v. Townshend, 7 Gill, 31 (1854); State v. Sewell, 3 Jones (L.), 245 (1855); People v. Smith, 67 Cal. 130 (1890); Chandler v. Barrett, 21 La. Ann. 58. And there is no presumption against the sanity of one formerly a lunatic but restored to reason. Snow v. Benton, 28 Ill. 306.

remote, subsequent period, or even several months later. The force of presumption arises from our observation and experience of the mutual connection between the facts shown to exist and those sought to be established by inference from those facts. Now, neither observation nor experience shows us that persons who are insane from the effect of some violent disease do not usually recover the right use of their mental faculties. Such cases are not unusual, and the return of a sound mind may be anticipated from the subsiding or removal of the disease which has prostrated their minds. It is not, therefore, to be stated as an unqualified maxim of the law, 'once insane, presumed to be always insane,' but reference must be had to the particular circumstances connected with the insanity of an individual, in deciding upon its effect upon the burden of proof or how far it may authorize the jury to infer that the same condition or state of mind attaches to the individual at a later period. There must be kept in view the distinction between the inferences to be drawn from proof of an habitual or apparently confirmed insanity, and that which may be only temporary. The existence of the former, once established, would require proof from the other party to show a restoration or recovery, and in the absence of such evidence, insanity would be presumed to continue. But if the proof only shows a case of insanity directly connected with some violent disease with which the individual is attacked, the party alleging the insanity must bring his proof of continued insanity to that point of time which bears directly upon the subject in controversy, and not content himself merely with proof of insanity at an earlier period."

RULE 32. — The character and habit of a person is presumed to continue as proved to be at a time past.

Illustrations.

I. It is held under a statute, that a gambler is incompetent to receive letters of administration. It is proved that on November 9, 1848, M.

resided in Santa Fe, and followed the profession of a gambler. In July, 1850, M. applies for letters of administration on his mother's estate. The presumption is that M. is still a gambler, and he is disqualified.¹

II. It is attempted to impeach the character of P., a witness at a trial. A. and B. knew P., four years before, when he resided at another place. They testify that P.'s character was then bad. The presumption is that P.'s character remains the same.²

In case II. it was said: "It might be too much to say that a character when once formed is presumed to remain unchanged for life. Still the law, founded on a full knowledge and just appreciation of the general course of human affairs, indulges a strong presumption against any sudden change in the moral as well as the mental and social condition of man. When the existence of a person, a personal relation or a state of things is once established by proof, the law presumes that the person, relation or state of things continues to exist as before till the contrary is shown, or till a different presumption is raised from the nature of the subject in question. The opinion, also, of individuals once entertained and expressed, and the state of mind once proved to exist, are presumed to remain unchanged, till the contrary appears. Thus a person, proved once to have existed, is, within certain limits, presumed still to exist. A partnership once established will be presumed to continue, and where derangement or imbecility of mind has been shown, its continuance is in like manner presumed until the contrary is shown. The principle on which the presumption in such cases rests has, it seems to me, a strong application to the question now before the court. It is not looking to common experience in human conduct, generally found to be true, that a thorough change from a bad to a good character is wrought within four years. It may, and it is to be hoped, often does occur; but such is not the common course of life. On the contrary there is a strong prob-

¹ McMahon v. Harrison, 6 N. Y. 443 (1853).

² Sleeper v. Van Middlesworth, 4 Denio, 431 (1847); Wood v. Mathews, 73 Mo. 422 (1881).

ability that one whose general character was bad four years since is still of doubtful or disparaged fame. So much at least may be asserted without evincing the feeling of a misanthropist or an unseemly lack of charity."

The fact that A. was frequently seen to purchase groceries from B., who was the only grocer in the place, does not raise the presumption that he purchased his entire supply from him, so as to authorize proof of the amount of groceries necessary for his family, or actually consumed by them during the time such purchases were made.¹

RULE 33.—Specific acts done in other cases do not raise the inference that a similar act was done in another case, and evidence of them is inadmissible.

Illustrations.

I. The question is whether A. entered into a contract in a certain form with B. Evidence that A. had entered into contracts in this form with other persons is inadmissible.²

II. A postmaster is sued for negligence by which a letter of C.'s was lost. Evidence of specific acts of negligence in relation to other letters is inadmissible.³

III. The question is whether a sale of guano was conditional and not to be paid for if not of a certain quality. The fact that the seller had made other sales on this condition is irrelevant.⁴

IV. S. is sued for selling diseased meat. Evidence that several years previous S. had sold a diseased hog is offered. The evidence is inadmissible.⁵

V. A. sues B. for articles furnished him on credit. B. contends that the articles were furnished to the firm of W. & T. Evidence that A. had previously refused to take W. & T.'s note for similar articles furnished to one J. is inadmissible.⁶

VI. A. sues B. for work and labor. As evidence of payment, B. offers to show that other laborers were employed by him at the same time, and

¹ Scott v. Cox, 20 Ala. 394 (1852).

² Delano v. Goodwin, 41 N. H. 205 (1858).

³ Wentworth v. Smith, 44 N. H. 419 (1862); Robinson v. Railroad, 7 Gray, 502.

⁴ Hollingham v. Head, 4 C. B. (N. s.) 338.

⁵ True v. Sanborn, 27 N. H. 383 (1853).

⁶ Swainson Machine Co. v. Walker, 23 N. H. 457 (1851).

on the same kind of work as A., and that these laborers were paid. This evidence is irrelevant.¹

VII. B. claims that A. promised to pay his (B.'s) debt against C. The fact that A. has previously, under similar circumstances, promised D. to pay his (D.'s) debt against C. raises no presumption that he promised to pay B.'s."²

"The plaintiff claims," it was said in case IV., "that the jury should have been allowed to make the presumption of fact of the unwholesomeness of the beef from the fact that the pork sold proved to be in an unwholesome condition. If the presumption could properly be made, it must be upon the ground that it is found among those natural presumptions that depend upon their own natural force and efficacy, in generating belief or conviction in the mind, as derived from those convictions which are pointed out by experience. * * * Is there seen to be such an intimate connection between the fact proved in this case, and the fact claimed to be inferred from it, as to lead naturally to the conclusion of its existence? Is the one fact to be inferred from the other as a matter of fair argument and reasoning? Is the inference so far natural and legitimate, and according to the experience of mankind as to lead to the inference of its clear probability? It would be the height of absurdity to hold that the sale of an article at a certain period which proved to be bad, of which the seller might have had no knowledge whatever, would form a proper and legal ground of inference that another and different article of property, sold several years after, by the same person to a different purchaser, was of bad quality also. In such case, there would manifestly be wanting that connection shown by experience between cause and effect, which lies at the foundation of the presumption to be made."

In case VI. the testimony offered had been admitted on the trial, but the Supreme Court held erroneously. "The

¹ *Filer v. Peebles*, 8 N. H. 226 (1836).

² *Phelps v. Conant*, 30 Vt. 277 (1856).

testimony," said the court, "seems to have been admitted directly against the rule that provides that neither the declarations nor any other acts of those who are mere strangers are admissible in evidence against any one as affording a presumption against them. It has been holden that the time at which one tenant pays his rent is not evidence to show at what time another tenant of the same landlord pays his rent. * * * There is no such relative situation shown as to these parties, as to raise any legal presumption that payment to one tends to show a payment to the other."

In case VII. it was said: "There was no legal connection between the two cases. It did not follow, by any means, that because the circumstances of the two cases were similar or identical even, the defendants, by assuming one debt were bound to assume the other. Nor is there any legal probability that he would pay one because he agreed to pay the other. We are apt to think because the cases are alike that the one helps prove the others. But they have no more legal connection than the giving a note to one man has with proving that the same party also gave his note to another. If the man bought on credit once, it is more probable, perhaps, that he will again, but one such case could not be shown to establish the others, for the reason that there is no necessary connection between them. To have one fact prove another there must be a necessary or probable connection between the two."

RULE 34. — But the habit of an individual being proved he is presumed to act in a particular case in accordance with that habit.

Illustrations.

I. The question is whether a certain person had given a receipt in a certain case. He testifies that although he can not remember that he gave a receipt in this particular case, yet he usually gave receipts in such case. His evidence is admissible and raises the presumption that he gave the receipt in this case.¹

¹ *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256 (1867), overruling *Schoneman v. Fegley*, 14 Id. 278 (1850).

II. The question is whether notice of additional insurance had been given by the insured to the insurer. The former is unable to speak positively but testified that it was always his custom to do so in such cases. His evidence is admissible.¹

III. The question is whether C., the attorney for the plaintiff in a former suit, had directed T., an officer to whom C. gave a writ for service, to take the receipt of M., and not remove the property. T. testifies that such directions were given; C. that they were not. Evidence that the uniform habit of C. as an attorney in delivering writs of attachment to officers for service was *not* to give instructions to them to take receipts, but to abstain from giving any instructions in regard thereto, is admissible, and will raise the inference that C. had not done so in the particular case.²

IV. The question is whether a railroad has received certain cotton for transportation. The company's agent testifies that it is the custom always to weigh and mark goods taken for transportation. The cotton in question was not marked. The presumption is that it was not received by the carrier.³

V. The question is whether A. made a certain deposit on a certain day, which A. alleges and the bank denies was made. The bank cashier testifies that it is his unvarying habit to enter all the deposits in the daily receipts. A.'s deposit does not appear in the list of receipts for that day. The presumption is that A. made no deposit as he alleges.⁴

VI. A suit is brought for the loss by fire of a quantity of rice taken to a mill to be ground. A. undertakes to prove by parol the amount of the rice taken to the mill. The mill owner proves that it is his usual custom to give written receipts for rice received by him. The presumption is that the receipt was so delivered, and A. can not prove the quantity by parol without accounting for the non-production of the receipt.⁵

VII. The question is whether B. accepted a draft by parol. The habit of B. in accepting drafts to do so in writing is proved. The presumption is that B. did not accept this draft by parol.⁶

VIII. The question is whether a certain person was personally served with a notice of dishonor or protest. The clerk of the bank testifies that it is his practice to do so. The presumption is that it was done in this case.⁷

¹ *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 356 (1867).

² *Hine v. Pomeroy*, 39 Vt. 211 (1859).

³ *Vaughn v. Raleigh, etc., R. Co.*, 63 N. C. 11 (1868), and see *Kershaw v. Wright*, 115 Mass. 361.

⁴ *Meighen v. Bank*, 25 Penn. St. 288.

⁵ *Ashe v. DeRosset*, 8 Jones (L.) 240.

⁶ *Smith v. Clark*, 19 Iowa, 32.

⁷ *Shove v. Wiley*, 18 Pick. 558.

IX. The question is whether a notice was mailed by a notary. From the habit of the notary to mail notices in all cases the presumption arises that it was.¹

X. The question is whether D. had paid his taxes in 1832 and 1833. The receipts of taxes issued to D. for nearly twenty-five years, and covering nearly all the period except these two years are shown. The presumption is that D. paid the taxes in these two years.²

Case I., where a contrary opinion was expressed, was overruled in case II. where it was said: "It is evident that (in case I.) the matter was regarded of no importance, as in truth it was in that case. No reasons were given and no authority was cited. We think it not uncommon in practice to corroborate the defective memory of a witness by proof of what was his habit in similar circumstances. Thus a subscribing witness to a will or bond, if unable to recollect whether he saw the testator or obligor sign the instrument or heard it acknowledged, is often permitted to testify to his own habit, never to sign as a witness without seeing the party sign whose signature he attests, or hearing that signature acknowledged, and it seems to be persuasive and legitimate supporting evidence."

In case III. the trial court had rejected the evidence, but its rulings were reversed on appeal. "There was a conflict," said the court, "between C. and T., C. testifying that he did not, against T. testifying that he did. In such cases it is commonly claimed that the testimony of him who testifies affirmatively that an act was done, or an event happened (other things being equal), is less likely to be erroneous, and is more reliable than the testimony of him who testified that such act was not done or such an event did not happen. Ordinarily it is said, and justly, that he who testifies to the negative may have forgotten a fact that

¹ *Shove v. Wiley*, 18 Pick. 561; *Trabue v. Sayre*, 1 Bush, 181; *Miller v. Haekley*, 5 Johns. 383; *Bell v. Hagaretown Bk.*, 7 Gill. 227; *Union Bk. v. Stone*, 50 Me. 595; *Coyle v. Gozler*, 2 Cranch C. C. 625; *Cookendorfer v. Preston*, 4 How. 317. But it has been held in New York that proof of the general character of a person as a usurer is not a proper foundation for presuming a contract by him to be usurious in a particular case. *Jackson v. Smith*, 7 Cow. 717 (1837).

² *Coxe v. Deringer*, 82 Penn. St. 258 (1876).

actually took place, while he who testifies affirmatively can not remember a fact that never did take place, and so upon common principle, affecting and governing the credit and weight to be given to testimony thus in conflict, it should rather be held that the one had forgotten than that the other had testified falsely. It seems proper as grounded in sound principle, and sanctioned by long usage, that such affirmative acts and circumstances as are connected with or kindred to the fact in controversy, and so related to it as to affect the conduct or the memory of the witness as to the main fact may be testified to by him as bearing upon the likelihood of his not having forgotten nor testified mistakenly as to the main fact. It is conceded, and many cases are cited which show that evidence of the character offered in this case only as corroborative has been received as pertinent and adequate of itself to prove a material fact, as in the case of subscribing witnesses who have forgotten about having witnessed the execution of a paper in question, as in the case of notices of presentment, protest, or the like, when the witness has no recollection of the fact, but testifies to his uniform habit and course of business in that respect and to his belief grounded upon it, and thus proves the material fact about which he has no active memory."

In case *X*. it was said: "This precise, methodical, and regular payment of the taxes on all the five tracts early in the year was strong evidence of D.'s punctuality. It proved his deep interest in the subject, which was not likely to fail in the performance of his duty to protect himself. It was a very natural conclusion that a man who always paid his taxes promptly in biennial periods previous to the time of sale would have paid them in time in 1832 and 1833."

RULE 35.—But a future continuance is never presumed.

Illustrations.

I. A. brings an action against B. for enticing his minor son to enlist in the army. The question is as to the measure of damages, whether A.

can recover for the loss of service until the end of his son's term (*i.e.*, three years or the end of the war, which at the time is raging), or only to the time of the trial. *Held*, the former, as the law can not presume that the war will continue to exist for three years or for any period.¹

II. In a suit for divorce it is shown that certain letters were written by the wife to a witness, three of them containing confessions of adultery. These letters were destroyed, while two subsequently received were handed to the custody of a third person. *Held*, that there was no presumption that these last letters were written on the same subject or contained similar confessions.²

“The enlistment,” it was said in case I., “was to end with the war, and the law will not presume in such a case that the war will continue three years. The law presumes that a fact continuous in its character still continues to exist until a change is shown, and so a state of war proved to exist three years ago is presumed in law to be still existing, unless the contrary be shown, but the law indulges no presumption at the present time that it will continue three years longer. On the contrary war is not the normal, but an exceptional state of society, and is generally regarded as a thing not to be desired either by individuals or nations. Peace is desirable and not war, and the presumption is that men and nations will do that which is for their interests and act with reference to them. The law, however, will not indulge in any presumption in regard to a future condition of war or peace. God alone knows what the future has in store for nations, and finite courts, whose visions can not penetrate the future, should not speculate as to its probabilities, much less attempt to solve them and make them the basis of their judgment. The rule is reasonable which presumes the continuance of an existing fact at the time of the trial, for the other party can overthrow it by proof if it be not so; but when it presumes a future continuance the party has no ability to unfold the future and give an answer by his proof.”

In case II. it was said: “It was presumed that such let-

¹ *Covert v. Gray*, 34 How. Pr. 450 (1866).

² *Strong v. Strong*, 1 Abb. Pr. (N. S.) 238 (1865).

ters, being part of a series as they are called, must have related to the same subject. I know of no principle upon which every friendly letter between the same parties is to be presumed in law to continue to advert to some one subject, or that confessions of guilt on that subject may be supposed to be reiterated or protestations of innocence inserted in every one; every thing is some time or other brought to an end, and every subject is sometimes absent from our thoughts or writings. Even a friend does not always continue to be confessor, and there is no experience of mankind which warrants the conclusion adopted in this case."

RULE 36.—An admission made by a party to a suit, or his attorney, that a certain fact exists and need not be proved, does not dispense with proof of the existence of that fact subsequent to the date of the admission.

Illustration.

I. A. sues C. as editor of a paper for a libel. On February 18th, B.'s attorney files an admission that B. is editor. On May 19th, another libel on A. appears in the same paper, and A. attempts to introduce this libel in the action for the first, as showing the motive of B. *Held*, that A. must first show that B. was editor of the paper at the time.¹

In case I., on the second article being offered, Mr. Brougham, who was counsel for B., objected to its introduction on the ground that there was no evidence that B. was the author of it. "We have only admitted him," said he, "to be editor up to the 13th of February, and this was published afterward." Mr. Scarlett (afterward Chief Baron Abinger) argued that having shown that B. was once editor, it lay on him to show that he did not continue so. But Lord Tenterden, C. J., ruled against him. "I do not think," said he, "that I can hold that this admission can be extended to a publication after its date. I consider that

¹ *McLeod v. Wakeley*, 8 O. & P. 811 (1828).

the admission goes down to its date, but no further," and the evidence was rejected.

RULE 37. — And a presumption is not retrospective.

Illustrations.

I. A deed is signed in 1854 by Henrietta C., her maiden name. There is evidence that in 1860 she was known as Mrs. D. There is no presumption that she was married in 1854.¹

II. Harriet G. executes a deed in 1854. The question is whether she was married at the time. There is evidence that she was then over twenty-five years old. This raises no presumption that she was then married.²

III. Depositions out of the State are allowed to be taken before "any judge or justice of the peace." A commission is issued to Texas; depositions are taken before one B. on June 5, 1848; and it is officially certified on June 29th that B. is a justice of the peace. There is no presumption from this that B. held that office on June 5th.³

IV. A. made a contract in 1860. In 1864 he was insane. There is no presumption that he was insane in 1860.⁴

V. M. committed a burglary in 1880 in the house of J. In 1881 M. was tried and it appeared on the trial that J. was married. This raises no presumption that J. was married at the time of the burglary.⁵

"The presumption of coverture," it was said in case I., "is prospective not retrospective. If we shall presume for the purpose of avoiding the deed executed by her in her maiden name, that she was married six years before we have any evidence that she was married at all, we might with the same propriety presume that she had been married sixteen years. Such is not the law."

In case III. it was said: "When the existence of a subject-matter or relation has been established, its continuance may be presumed. But here we are called upon to presume from the fact that a person was qualified to act as a

¹ *Erskine v. Davis*, 25 Ill. 251 (1861).

² *Erskine v. Davis*, 25 Ill. 251 (1861).

³ *Barell v. Lytle*, 4 La. Ann. 557 (1849).

⁴ *Taylor v. Cresswell*, 45 Md. 422.

⁵ *Murdock v. State*, 68 Ala. 567 (1881).

justice at a particular date, that he was qualified so to act at a period anterior to that date. Such a presumption is not supported either by reason or authority." In maritime law, a different rule seems to prevail. Thus a ship soon after leaving port becomes so leaky and disabled as to be unable to proceed. There is no evidence that she encountered any great storm or peril of the sea. The presumption is that she was unseaworthy when she sailed."¹

In case V. it was said: "When the existence of a personal relation or a state of things continuous in its nature is once established by proof, the law presumes that such *status* continues to exist as before, until the contrary is proved, or until a different presumption is raised from the nature of the subject in question. But this presumption can not be permitted to operate retrospectively, so as to infer the prior existence of coverture or other like relationship from proof of its present existence. It may be that the parties contracted the relationship within a few days before the trial."

RULE 38.—In case of conflicting presumptions, the presumption of the continuance of things is weaker than the presumption of innocence.

Illustration.

I. A bankrupt, in 1837, makes a scheduled return of his property. It is afterward discovered that in 1835 he owned certain property which was not included in the schedule. There is no presumption that he owned this property in 1837, for the presumption is that he did not commit a fraud.²

¹ Wright v. Orient Ins. Co., 6 Bosw. 270 (1860); 1 Arnould on Ins. 636, sec. 255.

² Powell v. Knox, 16 Ala. 634 (1849).

CHAPTER IX.

THE PRESUMPTION OF LIFE.

RULE 39. — Love of life is presumed¹ (A.), and a person proved to have been alive at a former time is presumed to be alive at the present time² until his death is proved or a presumption of death arises (B.).

Illustrations

A.

I. H. is found dead. An examination reveals that his death was caused by taking arsenic. H.'s life is insured, and the question arises whether his death was caused by suicide or accident. The presumption is that it was caused by the latter.³

II. W. is killed by a railroad engine. The question is whether W. could or could not have escaped the peril if he had desired to. The presumption is that he could not.⁴

III. A person is found dead. The presumption is that his death was natural or accidental.⁵

IV. A. is found drowned. The presumption is that the drowning was accidental.⁶

In case I. it was laid down that where there is the occurrence of death merely, and no evidence upon the subject, the presumption is that it was from natural causes, and not an act of self-destruction. This presumption prevails in

¹ Illinois Cent. R. Co. v. Cragin, 71 Ill. 184 (1873).

² King v. Fowler, 11 Pick. 302 (1831); Innes v. Campbell, 1 Rawle, 575 (1829); Fullweiler v. Baugher, 15 S. & R. 45 (1826); Pennefather v. Pennefather, Irish Rep. 6 Eq. 171 (1872); O'Gara v. Eisenlohr, 38 N. Y. 296 (1866); Battin v. Bigelow, 1 Pet. C. C. 453 (1871); Hall v. Com., Hardin (Ky.), 480 (1866); Lowe v. Foulke, 103 Ill. 58 (1882).

³ Guardian Life Ins. Co. v. Hogan, 80 Ill. 35 (1875).

⁴ Way v. Illinois Central R. Co., 40 Ia. 342 (1875); Morrison v. New York Cent. R. Co., 63 N. Y. 643 (1875).

⁵ Germain v. Brooklyn Life Ins. Co., 26 Hun, 604 (1882). But this presumption does not extend to an *insane man*, found dead. *Id.*

⁶ Continental Ins. Co. v. Delpeuch, 82 Pa. St. 235 (1876).

the absence of proof or in cases where the evidence on this point is equally balanced.

In case II. the instincts prompting the preservation of life were said to be properly thrown into the scale of evidence, like the presumptions of sanity and innocence.

In case III. it was said: "The party alleging suicide must prove it. The mere fact of death in an unknown manner creates no legal presumption of suicide. Upon evenly balanced testimony the law assumes innocence rather than crime. Preponderating evidence is necessary to establish the latter."

B.

I. In 1831 the State of Georgia granted a tract of land to one T., who had been a soldier in the revolutionary war. In an action brought in 1857 there is no presumption that T. is dead at this last date.¹

II. A., an infant, and his father executed a deed binding A. to C. for a term of years. Subsequently the infant brings an action on the deed. There is no proof that the father was alive at this time. The presumption of law is that C. was alive.²

III. A patent of land is produced granted to O. in 1695. It can not be presumed that O. was not alive in 1778.³

IV. It was shown in 1843 that H., whose deposition in a case was taken in 1822, was then fifty-nine years old, and in bad health. He lived then in New York City. He is not shown to have ever left there, but his address is not now (1843) known at the post-office, nor is it in the city directory. There is no presumption that H. is now (1843) dead.⁴

V. In an action on a recognizance given by M., the plea is that since its execution M. has died. The burden of proving the death of M. is on the defendant.⁵

VI. J. R. T., a young sailor, was last seen in the summer of 1840 going to Portsmouth to embark on board ship. He was not subsequently seen. His grandmother died in March 1841. The presumption is that he survived his grandmother.⁶

¹ *Watson v. Tindal*, 24 Ga. 494 (1858).

² *Letts v. Brooks, Hill & Denio*, 361 (1842).

³ *Hammond v. Inloes*, 4 Md. 140 (1853).

⁴ *Re Hall*, 1 Wall. jr. 85 (1843).

⁵ *Wilson v. Hodges*, 3 East, 313 (1802).

⁶ *Re Tindall's Trust*, 30 Beav. 151 (1861).

VII. In 1732 a deposition of a witness made in 1682 is offered. There being no proof that the witness is dead, the presumption is he that is still alive, and the deposition is inadmissible.¹

VIII. A. is shown in a case tried in 1837 to have been alive in the year 1034. The law will not infer that A. is dead without some evidence.²

In case III. the court said: "The death of a person may be presumed after a long lapse of time," without attempting to say what that time was. But on the other hand, it laid it down that "when persons are known to have survived ninety and one hundred years we can not say that others have died at an earlier age without some evidence on the subject." In a subsequent case in the same State³ the court was equally contradictory. "Though there is no legal presumption of the period when death occurred or up to which life endured," said Alvey, J., "yet it may be presumed that Jacob Giles died before the bringing of this suit, because it would be contradictory to the ordinary course of nature that he should be living at that time." It nowhere appears in the opinion at what date the suit was instituted. John Giles, the father of Jacob, died in 1725; he had eight children, of whom Jacob was the second. In 1732 Jacob made a deed of the land in controversy. Alvey, J., delivered the judgment in which these views were expressed in the year 1868.⁴

In case IV. Mr. Justice Baldwin said: "The life of a person once shown to exist is intended to continue till the contrary be proved, or is to be presumed from the nature of the case. Direct proof is not here offered. Are the facts which are shown sufficient to supply its place? The witness, if alive, is eighty years old; an age that we may admit is an advanced one; but is yet one to which life is occasionally — nay, not unfrequently, prolonged. The

¹ Benson v. Olive, 2 Strange, 920 (1732).

² Atkins v. Warrington, Best Ev. 412; Chitty Pldg. 616.

³ Sprigg v. Moale, 28 Md. 506 (1868).

⁴ And see Jarboe v. McAfee 7 B. Monr. 282 (1847).

court can not therefore presume, as of course, that Hall has not reached it. Lord Hale has indeed said that it shall be presumed life will not exceed ninety-nine years,¹ and it may be inferred that a man, if of any age already, will not live eighty years besides;² but Chief Baron Reynolds refused to presume a witness dead who had been examined sixty years before, there having been no proper searches or inquiry made after him. Neither does the circumstance that the witness was in bad health in 1722 infer, as necessary consequence, that he is now dead. The difficulty is here — that the expression ‘bad health’ is indeterminate. There are manifold sorts of bad health, and many degrees in most of them. Show me that Hall was the subject of some quick, consuming disease, or of any specific malady at all, and you will change the case. Suppose that his ‘bad health’ was temporary, or that the expression means only that his health was not robust. A man in bad health at one time may recover afterward; that depends entirely upon the nature of his disorder and mode of treatment and vigor of his constitution. And the valetudinarian often prolongs an existence beyond him, who in the carelessness of health, may be suddenly cut down. In the case cited from 13 Vesey³ the health was very bad (the chancellor speaks of it as ‘desperate’), and the man was to have been heard of six months after he went away, several years before. * * *

Is the case essentially changed by the inquiries made at the post-office? This difficulty occurs — that there is nothing to show that H. was a person likely to be known there; that he was in the habit of receiving letters, or that he was a person of any note or consequence. It is no presumption of law that the runners at the post-office know, so as to answer at first inquiry, the name and residence of every person in a populous city. Remarks of a similar sort apply to the inference which would be drawn from the

¹ Weale v. Lomer, Pollex. 55.

² Napper v. Saunders, Hutton, 118; Keeble's Case, Littleton, 571.

³ Webster v. Birchmore.

absence of the name from the directory. Indeed in the insignificance of advanced old age, a man has generally ceased to make impression on the busy world or to be enrolled on the register of its active concerns. It seems to me difficult to suppose that direct evidence can not be given of a death, which if it has occurred, has occurred close to us, and since 1822. Or did H. ever leave the place of his former residence? Let this fact be shown, and that his friends have not heard of him for seven years. Had he no friends — let that fact be shown. The difficulty is that the plaintiff does not show that he has made proper search or inquiry for H. Had he done this, and been unable to hear any thing of the person, I should be of opinion to receive the testimony. But there is a meagerness about all this part of the case which is unsatisfactory, to use no harsher adjective. It shuts up the access to presumption, which would have otherwise been easy. In short, I see nothing in any of the circumstances shown, nor in all of them together, which, in the absence of proper inquiry, brings that weight and conclusiveness which ought to exist before you set aside a wise and deep laid rule of law.”

In case *V. Lord Ellenborough* said he relied on the earlier case of *Throgmorton v. Walton*,¹ where it was decided that where the issue is upon the life or death of a person once shown to be living, the proof of the fact lies on the party who asserts the death; for that the presumption is that the party continues alive until the contrary is shown.

In a New York case it was said: “There is nothing in the point raised on the part of the defendant that the trustees are to be presumed dead from the lapse of time since they were heard from. The rule is that the proof of the death of a person known to be once living is incumbent upon the party who asserts his death; for it is presumed that he still lives until the contrary be proved. The presumption of death from any lapse of time which the evidence in this case could justify, would only apply where the individual

alleged to be dead has left the place of his domicile, and had not been heard of for seven years or more. No such proof was given or offered in the present case."¹

RULE 40. — Death may be proved by reputation, by hearsay, or by evidence of facts inconsistent with the theory of the existence of life.²

Illustrations.

I. The question in 1869 is whether H., who was alive in 1845, is dead. Acquaintances testify that his death, in 1845, was announced in the newspapers, and that his friends spoke of him as being dead. This overturns the presumption that he is alive.³

II. K. was married in 1719, and had six children. It is proved that inquiry had been made where information of them would naturally be obtained, and no account of five of them could be had. This is held sufficient, seventy years having elapsed, to justify the inference that they were dead without lawful issue.⁴

III. Forty-eight years before, a conveyance was made to one C. by order of court. No claim has since been made by parties, who if living, would be entitled. The presumption is that they are dead.⁵

RULE 41. — One who is proved to have been unmarried when last known to be alive will be presumed to have died childless; but it is otherwise where he or she was married when last known to be alive.⁶

Illustrations.

I. W. emigrated from Australia to Ireland in 1854, and continues to communicate with his relatives in Ireland until 1856. Since then nothing

¹ Duke of Cumberland v. Graves, 9 Barb. 608 (1850).

² Anderson v. Parker, 6 Cal. 197 (1856); Jackson v. Etz, 5 Cow. 319 (1826); Scheel v. Eidman, 77 Ill. 304 (1872); Bailey v. Bailey, 36 Mich. 185 (1877); John Hancock Ins. Co. v. Moore, 34 Mich. 41 (1876); Crouch v. Eveleth, 15 Mass. 305 (1818); Buloff v. People, 18 N. Y. 129 (1858).

³ Ringhouse v. Keever, 49 Ill. 470 (1869).

⁴ King v. Fowler, 11 Pick. 302 (1831).

⁵ Allen v. Lyons, 3 Wash. C. C. 475 (1811); Thomas v. Visitors of Frederick Co. School, 7 Gill & J. 385 (1835).

⁶ McComb v. Wright, 5 Johns. Ch. 263 (1821); Hammond v. Inloes, 4 Md. 140 (1853); Stinchfield v. Emerson, 52 Me. 465 (1864); Peterkin v. Inloes, 4 Md. 175 (1853); Sprigg v. Moale, 28 Id. 506 (1868); Emerson v. White, 29 N. H. 483 (1854); Oldnall v. Deakin, 3 C. & P. 404 (1823); Banning v. Griffin, 15 East, 293; Richards v. Richards, Id. 294 (1812); Oldham v. Wolley, 8 B. & C. 22 (1823); Dunn v. Snowden, 32 L. J. (Ch.) 104 (1862); Hays v. Tribble, 3 B. Monr. 109 (1842).

has been heard of him, though inquiries had been made. When he left Ireland he was unmarried. In 1866 the presumption is that W. was dead without issue.¹

II. It is proved that D. R., with a wife and one child, left his home in 1824. He has not, in 1854, been heard of. The presumption is that D. R. is dead,² but there is no presumption that he has no issue living.³

III. A married woman went from Ireland to America in 1847 with her husband and seven children. She dies in America in 1866. There is no presumption in 1876 that all the seven children have died without issue.⁴

In case II. it was said: "As nothing had been heard from D. R. for many years, the law would raise a presumption of his death; and had he been a bachelor when last known or heard from, the presumption would be that he died unmarried and without issue; but as he had a wife and child in full life when he left the country, the presumption of his death would not ignore their existence."

RULE 42.— But it is to be presumed that a person proved to be dead left an heir.

Illustration.

I. P. mortgaged certain real estate to T., and died intestate, without disposing of the equity of redemption. T. files a bill against the administrator to foreclose the mortgage. The heirs of P. should have been added, as the presumption is that P. left heirs.⁵

In case I. it was said: "It is insisted that there is nothing in this case to show that the mortgager had heirs to whom the equity of redemption descended. Under our law the presumption clearly is that he left heirs capable of succeeding to the estate; and there is nothing in the record to repel the presumption. The constitution declares that 'no conviction shall work corruption of blood or forfeiture of estate.' The statute provides that the estate of a person

¹ *Re Webb*, Irish Rep. 5 Eq. 235 (1870).

² See Rule 43

³ *Campbell v. Reed*, 24 Penn. St. 496 (1855).

⁴ *Mullaly v. Walsh*, Irish Rep. 6 C. L. 315 (1872).

⁵ *Harvey v. Thornton*, 14 Ill. 217 (1852.)

dying intestate shall go to the next of kin, however remote in degree; and aliens and non-residents are as capable of taking the estate as citizens or residents. It is difficult, therefore, to imagine a case, unless it be that of a bastard, dying intestate and without issue, where an intestate does not leave kindred on whom the law casts his estate. It sometimes happens that the State acquires an estate under the operation of the law of escheat, but that may be not because there are no persons *in esse* to take the estate, but because they do not appear to claim it. The presumption is so violent that the estate of an intestate is transmitted to others by descent, that it can only be repelled by proof that the fact is otherwise. It may perhaps be, if the bill had contained an allegation that the mortgager died without heirs, that the decree might be sustained. But in the absence of such an averment, it is clearly the duty of the court to intend that there are persons in existence who inherited the equity of redemption; and they must be brought into the case before a decree of foreclosure can properly be entered. If the heirs are not known they can, under the statute, be proceeded against as unknown persons."

CHAPTER X.

THE PRESUMPTION OF DEATH.

RULE 43. — An absentee shown not to have been heard of for seven years by persons, who if he had been alive would naturally have heard of him, is presumed to have been alive until the expiry of such seven years, and to have died at the end of that term.¹

Illustrations.

I. In the middle of November, 1846, Captain M., in command of a ship of war with ten seamen, sailed on a launch from San Francisco to Fort Sutter, on the Sacramento River. No intelligence was ever after

¹ *Stevens v. McNamara*, 36 Me. 176 (1853); *Doe v. Flanagan*, 1 Ga. 538 (1846); *Spears v. Burton*, 31 Miss. 554 (1856); *Craig v. Craig*, 1 Bailey (Eq.) (S. C.) 103 (1830); *Clarke v. Cummings*, 5 Barb. 353 (1849); *Tilly v. Tilly*, 2 Bland Ch. 444; (1840); *Foulks v. Rhea*, 7 Bush, 568 (1870); *Ashbury v. Sanders*, 8 Cal. 62 (1857); *Godfrey v. Schmidt*, 1 Cheves (S. C.), 57 (1840); *Moffett v. Varden*, 5 Cranch C. C. 658 (1840); Anonymous, 2 Hayw. (S. C.) 134 (1801); *Bowden v. Evans*, 2 Hayw. (S. C.) 222 (1802); *Crawford v. Elliott*, 1 Houst. (Del.) 465 (1855); *Hancock v. American Life Ins. Co.*, 62 Mo. 26 (1876); *Smith v. Knowlton*, 11 N. H. 196 (1840); *King v. Paddock*, 18 Johns. 141 (1820); *Bradley v. Bradley*, 4 Whart. 173 (1838); *Loring v. Steinman*, 1 Metc. 210 (1840); *Spears v. Burton*, 31 Miss. 547 (1856); *Forsyth v. Clark*, 21 N. H. 424 (1850); *Rosenthal v. Mayhugh*, 33 Ohio St. 155 (1877); *Rice v. Lumley*, 10 Id. 596 (1857); *Youngs v. Heffner*, 36 Id. 232 (1880); *Mayhugh v. Rosenthal*, 1 Cinn. Sup. Ct. 492 (1871); *Holmes v. Johnson*, 42 Pa. St. 159 (1862); *Innis v. Campbell*, 1 Rawle, 375 (1829); *Puckett v. State*, 1 Sneed, 356 (1853); *Primm v. Stewart*, 7 Texas, 183 (1851); *Re Hall*, 1 Wall. jr. 85 (1843); *Woods v. Woods*, 2 Bay, 476 (1802); *McNair v. Ragland*, 1 Dev. (Eq.) 533 (1830); *Davis v. Briggs*, 7 Otto, 628 (1878); *Rust v. Baker*, 8 Sim. 443 (1837); *Onomaney v. Stillwell*, 23 Beav. 328 (1856); *Ewing v. Savery*, 3 Bibb, 235 (1813); *Adams v. Jones*, 39 Ga. 506 (1869); *Proctor v. McCall*, 2 Bailey (S. C.), 134; 23 Am. Dec. 134 (1831); *Lajoie v. Primm*, 3 Mo. 529 (1834); *Hoyt v. Newbold*, 45 N. J. (L.) 219 (1883). In *Naisor v. Brockway*, Rich. Eq. Cas. 449 (1830), there is an extraordinary ruling by Chancellor Harper, of South Carolina, to the effect that where an absentee is unheard of for seven years, the presumption is that he died at the commencement of that period. The question was whether one Philip Naisor Brockway could be presumed to have died before reaching the age of twenty-one years. He was born in 1800, and left home in 1814. Late in 1814 he was last heard of. The chancellor held that he must be presumed to have died a minor, saying: "When the period of seven years has elapsed the law presumes that it was occasioned by death and not by any minor casualty. Not death at the end of the period; but that the ignorance of his existence during the whole period was the consequence of his death. This seems naturally to have relation to the earliest period when his existence became uncertain."

received of the launch or any of its crew. On December 1, 1846, a grant of land was made to Captain M. The presumption is that Captain M. was alive on December 1, 1871.¹

II. E. died on September 9, 1851, leaving a legacy to his son W. In May, 1846, W. wrote to his brother that he was to sail from Baltimore to Africa in a few days in charge of a brig. Nothing was subsequently heard of him. The presumption is that W. was alive on September 9, 1851.²

III. In March, 1861, M. disappeared from his boarding-house in New York with the declared intention of going South, and was not afterward seen or heard of. In 1871 his administrator brought an action on a policy of insurance on his life. The company defended on the ground of a failure to pay a premium due in June, 1861. M. is presumed to have been alive at that time, and the administrator can not recover.³

IV. In 1866, A. claiming as the wife of N., brought an action for dower in land which the defendant claimed by virtue of a deed made in 1856. It is proved that N. has not been heard of since March 21, 1852. The presumption is that he was dead on March 22, 1859.⁴

V. C. died December 4, 1852, leaving by her will a legacy to her nephew, E. In 1837, E. resided in Connecticut, but removed to New York, where he was heard from until 1849, when he ceased to correspond with his friends in Connecticut, and was not subsequently heard of. If

The chancellor afterward found that he had drawn the line too closely, for he adds in a note to the report of the case: "Memorandum. After this decree and after the distribution, Philip Naisor Brockway, as I am informed, made his appearance in Charleston in good health." But see *Chapman v. Cooper*, 5 Rich. (L.) 452 (1852). The rule adopted in England is different. It seems to be established by the decision of the highest courts in that country, that where a person goes abroad and is not heard of for seven years, the law presumes that he is dead, but there is no presumption of law that he died at any precise time within these years. In other words, that on the one hand the time at which a person died within the seven years is not a matter of presumption but of proof, and on the other, there is no presumption of the continuance of life after the disappearance of the party; but the *onus* of proving the death or existence of the party at any particular time within that period lies on the person who claims a right resting on the establishment of either of these facts. *Doe v. Nepean*, 5 B. & Ad. 36; *Knight v. Nepean*, 2 M. & W. 895; *Re Phene's Trusts*, L. R. 5 Ch. App. 139; *Re How*, 1 Sw. & T. 53 (1858); *Thomas v. Thomas*, 2 Dr. & Sm. 298 (1864); *Re Benham's Trusts*, 37 L. J. (Ch.) 265 (1863); *Lambe v. Orton*, 29 *Id.* 286 (1860); *Re Peck*, 29 L. J. (P. & M.) 95 (1860). But the English cases are not in accord on this point, as will be seen by consulting *R. v. Wellshire*, 6 Q. B. Div. 366; *Re Corbishley's Trusts*, 14 Ch. Div. 846; *Gill v. Manley*, 16 Ir. L. T. 87; *Wilson v. Hodges*, 2 East, 313; *Doe v. Jesson*, 6 *Id.* 80; *Rowe v. Hosland*, 1 W. Bl. 404. A few cases in the American courts follow the English rule. *State v. Moore*, 11 Ired. (L.) 160 (1850); *Spencer v. Roper*, 13 *Id.* 333 (1852). Proof of a rumor that the party was alive within the seven years that turned out to be untrue rather strengthens instead of weakens the presumption of death. *Moore v. Parker*, 13 Ired. (L.) 123 (1851).

¹ *Montgomery v. Bevans*, 1 Sawy. 660 (1871).

² *Eagle's Case*, 3 Abb. Pr. 218 (1866); *Bradley v. Bradley*, 4 Whart. 173 (1838); *Whiteside's Appeal*, 23 Pa. St. 114 (1854).

³ *Hancock v. American Life Insurance Co.*, 62 Mo. 26 (1876).

⁴ *Whiting v. Nicholl*, 43 Ill. 235 (1867).

E. died before C. the legacy lapsed. If he survived in 1862 (when the suit was brought), it belonged to him. If he died after C. it belonged to his next of kin. The presumption is that E. did not die till 1856, and the legacy goes to his next of kin.¹

VI. J. sailed from New York to Europe in 1791, and nothing was subsequently heard of him. The presumption is that A. continued alive till the expiration of seven years from the day he sailed from New York.²

VII. A woman was sued on a promissory note dated in 1808. She pleaded coverture at the time. It was proved that she was married in England in 1779 to a person who went to Jamaica twelve years before the trial. The presumption is that the husband was dead after seven years' absence.³

VIII. S. disappeared at an unknown date in the year 1809. There is no presumption that S. was dead on April 29, 1816.⁴

In fixing this arbitrary period of seven years — for it might just as reasonably have been five or ten — the judges followed the Legislature, which in the times of James the First and of Charles the Second, in order to render it possible for the wife of an absent party to marry again without fear of committing a crime, and to lessen the inconvenience of ascertaining and proving the death of *cestuis que vie* in leases, provided that seven years' absence without being heard of should be sufficient proof of death in both cases.

In one case an English vice-chancellor expressed the opinion that the presumptions relating to death were becoming more and more untenable. "Owing," said he, "to the facility which traveling by steam afforded, a person may now be transported in a very short space of time from this country to the backwoods of America, or some other remote region, where he may never be heard of again."

A period longer than seven years would, according to this reasoning, best suit the necessities of modern habits and invention. But nine men out of ten would be likely to come from the same premise to the very opposite con-

¹ Clarke v. Canfield, 15 N. J. (Eq.) 119 (1862).

² Burr v. Sim, 4 Whart. 150; 83 Am. Dec. 50 (1838).

³ Hopewell v. De Pinney, 2 Camp. 113 (1800).

⁴ Dean v. Bittner, 77 Mo. 101 (1882).

⁵ Shadwell, V. C., in Watson v. England, 14 Sim. 23.

clusion. To go abroad a hundred and fifty years ago, was attended in the first place with greater danger, and in the second place, his means of communication were infrequent and uncertain. Every one who at that time went to regions at all remote was as much cut off from the facilities of a modern post-office as was Livingstone during the time that Stanley was in search of him, or as our Arctic explorers of the present day. But to-day it is only the explorer or the hermit who is able to put himself beyond the means of communication with any part of the world.

“The law as declared in England,” it was said by Mr. Justice Field, in case I., “is different from the law which obtains in this country, so far as it relates to the presumption of the continuance of life. Here, as in England, the law presumes that a person who has not been heard of for seven years is dead, but here the law, differing in this respect from the law of England, presumes that a party once shown to be alive continues alive until his death is proved, or the rule of law applies by which death is presumed to have occurred, that is, at the end of seven years. And the presumption of life is received, in the absence of any countervailing testimony, as conclusive of the fact, establishing it for the purpose of determining the rights of parties as fully as the most positive proof. The only exception to the operation of this presumption is when it conflicts with the presumption of innocence, in which case the latter prevails. This rule is much more convenient in its application, and works greater justice than the doctrine which obtains in England, according to the decision in *Phene Trusts*, that the existence of life at any particular time within the seven years, when the fact becomes material, must be affirmatively proved. In numerous cases such proof can never be made, and property must often remain undistributed, or be distributed among the contestants, not according to any settled principle, but according as one or the other happens to be the moving party in court. Take this case by way of illustration: A man goes to sea on the first of January,

1860, and is never heard of again: his father makes his will and dies on the first of July of the same year, leaving him a portion of his property, and the residue to a distant relative. If persons claiming under the missing man apply for the legacy to him, they must fail, for they can not prove that he survived the testator. On the other hand, if the residuary legatee applies for the property on the ground that the legacy to the missing man has lapsed, he must fail, for he can not prove that the missing man died before the testator, and the proof of his death in such case would be essential to the establishment of the applicant's right. Nor is this rule as to the presumption of the continuance of life up to the end of the seven years justly subject to the criticism of counsel, that it renders absurd the whole basis on which the presumption of death rests. There must be some period when the presumption of the continuance of life ceases and the presumption of death supervenes; and as in all cases where the existence of a presumption arising from the lapse of time is limited by a fixed period, it is difficult to assign any valid reason why one presumption should cease at the particular time designated, rather than at some other period and a different presumption arise, except that it is important that some time, when the change takes place, should be permanently established. It would be difficult to assign any other reason than this for the presumption which obtains in some States that a debt is paid upon which no action has been brought, after the lapse of six years; and that it is unpaid up to the last hour of the sixth year. The presumption of payment arising from the lapse of time without action, it might be said with equal propriety, as in the present case with respect to the presumption of life to the end of the seventh year, that if the presumption of non-payment extends up to the end of the sixth year, it renders absurd the whole basis upon which the presumption of payment rests. So it would be difficult to give any sufficient reason for admitting in evidence a deed thirty years old without other proof of its execution than what is apparent

on its face, and at the same time refusing admission to a deed except upon full proof of its execution, which has existed thirty years less one day — except that it is important that the period should be fixed at which the presumption arises which supersedes the necessity of direct proof.”

In case II. it was said: “What is a court or jury to do when there are no accompanying circumstances, when there is no ground, in fact, for inferring death at any particular time. The question is not whether those presumptions are rigid and strict, but whether there are any such presumptions, and if so what is their effect when there is an entire dearth of evidence tending to guide the conclusion as to life or death. Confessedly before the analogy drawn from the statute of bigamy and life tenancies prevailed, it was a rule of evidence to presume life until the contrary was shown. That rule still continues except so far as it has been modified by the presumption drawn from the statutes of death after seven years’ absence without intelligence. The practical effect of these two rules, if both are to be taken as subsisting, is that whenever the law is invoked as to the rights depending upon the life or death of the absent party, he is to be deemed as living until the seven years have expired, and after that is to be deemed as dead. Not that the law finds as a matter of fact that he died on the last day of the seven years, *but that rights depending on his life or death are to be administered as if he had died on that day.* It is impossible to say when he died, or even to assert as a matter of fact that he is dead, but in the absence of all evidence the law will account him as dead at a certain time and not before. This is an artificial rule, and of course can not be expected to square with the actual fact. It is the logical result of the presumptions, founded upon reasons of convenience, and the necessity of fixing upon some limit within which the relations of the living to the absent are to be determined, more than upon any strong probabilities. This is the meaning of our statute in respect to life estates which declared that if the life tenant shall absent himself

for seven years, and his death shall come in question, such person shall be accounted naturally dead in any action concerning the lands in which he had the estate for life, unless sufficient proof be made that he is still living. He shall be *accounted* dead. The law so treats him and accounts him, just as the common law treated and accounted him living until his death was proved. In neither case can it be said that his life or death has been actually proved, but in both cases it may be said that he shall be accounted living until by reason of his absence the law accounts him dead; and for the purposes of justice, the rights and relations of parties affected by his life or decease shall in the absence of information be determined by this technical presumption. This certainly seems to me the most consistent and symmetrical rule; and when it is regarded as a dry legal doctrine adapted for purposes of convenience, and from the necessity of having some limited period for the determination of the rights of absent persons, and not as a determination upon the death or the real time of the death, there would appear to be no grave objection against it. * * * The result is that in the case of absent persons, it is within the province of the court or jury to infer from circumstances, if any appear in proof, the probable time of death; but if no sufficient facts are shown from which to draw a reasonable inference that death occurred before the lapse of seven years, the person will be accounted in all legal proceedings as having lived during that period."

In case IV. it was said: "It has come to be regarded as a settled principle that the absence of a party for seven years, without any intelligence being received of him within that time, raises the presumption that he is dead, and the jury on proof of such absence have a right to presume his death. A less period will not suffice to raise the presumption, but a party whose interest it is to show that he was living within that time is at liberty to show it by such facts and circumstances as will inspire that belief in the minds of the jury. As in this case the demandant, to make out

her right to bring her action, had only to show her husband had not been heard of from the 21st of March, 1852, to the 21st of March, 1859, the presumption of law then comes in that he was dead on the 22d of March, 1859, being seven years from the time he was last heard of. This is all the proof she was required to submit, the marriage being established and no question being made as to the title of her husband. When she by competent proof raised this presumption of death, to what period of time did it extend? The answer is plain, — her right to sue did not exist until the death of her husband was established, and as that was not established until the 21st day of March, 1859, the presumption took effect on that day; then, in legal contemplation, her husband was not among the living.”

Case V. was decided in New Jersey, where by statute a person is presumed to be dead after seven years' absence without being heard of. The court said: “It is urged that although at the end of seven years the law presumes that the absent party is dead, there is no presumption *when* he died; that the law was designed to furnish evidence of the *fact* of the death, but not of the *time* of the death. This view of the operation of the statute was adopted by the Court of King's Bench and Exchequer in *Doe v. Nepean*, and appears to be the settled doctrine of the English courts. The same view appears also to have been adopted in some of the American decisions. * * * In the present case this view of the statute must give rise to much more serious embarrassment, and will defeat a recovery of the fund by either party from the impossibility of ascertaining when the legatee died. The child of the special legatee, to entitle himself to recover, must show that the legatee survived the testatrix, otherwise the legacy lapsed. The residuary legatee, to establish her claim, must show that the special legatee died in the lifetime of the testatrix, for in that event alone is she entitled to the fund. And no length of time will remove the difficulty, so that the title to

the fund must forever remain unsettled. Similar embarrassments, it is obvious, will be encountered in numerous cases in which the aid of the statute may be invoked. A construction which leads to such results ought not to be adopted, except for the most cogent reasons. It will greatly impair the beneficent design of the statute, which was, I apprehend, to furnish a legal presumption of the *time* of the death as well as of the *fact* of the death. And that design it accomplished by the fairest rules of interpretation. The legatee is proved to have been living about three years before the death of the testatrix. The legal presumption, independent of the statute, is that life continues until the contrary is shown or until a different presumption is raised. In the absence of the statute the presumption would be that the legatee is still alive. The design of the statute was by an arbitrary rule to fix a definite limit to that presumption of the continuance of life by a contrary presumption that life has ceased. But the presumption of life ceases only when it is overcome by the countervailing presumption of death. And the real question is not whether the statute furnishes any evidence of the precise time of the death, but whether it furnishes any evidence of the occurrence of death before the end of the seven years. If it does not, the presumption of life continues by well settled rules of evidence independent of the statute. *The presumption of death which arises upon the expiration of the seven years can not act retrospectively.* * * * There may be circumstances which will create a presumption in fact of the death of an absent party within seven years. But this in no wise affects the legal presumption created by the statute, and in the absence of such circumstances the presumption of life continues until arrested by the statute. It is no answer to say that the probabilities are that death did not occur at the expiration of the seven years, but at some other time within that period. The time of the death, as well as the fact of death, are presumptions not of fact but of law. The

law regards neither as certain. It simply declares that the party shall be presumed to be dead at the expiration of the seven years, whenever his death shall come in question. The language of the statute, as well as that of 6 Anne and 19 Charles I., for which our statute was designed as a substitute, clearly indicates that an arbitrary rule was designed to be established, by which the rights of parties litigant might be determined in the absence of more unequivocal proof, however inconsistent that presumption might be with the actual truth of the case. This view of the effect of the presumption created by the statute is sustained by the great weight of American authority. It appearing that the special legatee was in life about three years before the death of the testatrix, the presumption is that he continued in life until after the death of the testatrix, and that consequently the legacy did not lapse. More than seven years having elapsed since the legatee was last heard from, the legal presumption created by the statute attaches. The legatee is now presumed to be dead, and the next of kin is entitled to the fund."

In case VI., it was said: "Not only convenience, but necessity, calls for a definite rule to produce certainty of result in the determination of facts which must be passed upon without proof; and such can be obtained only from the doctrine of presumptions which however arbitrary, is indispensable, and when founded on the ordinary course of events, productive of results which usually accord with the truth. There is nothing so frequently unattended with the ordinary means of proof, and yet so essential to the determination of a right, as the time of an individual's death. The common law soon had recourse to presumption for the continuance of life, by casting the proof of its cessation on him who alleged it; yet it must have been obvious that a counter presumption of superior power, founded in experience of the ordinary duration of human existence, and leading to a certain conclusion of death, might be raised from lapse of time alone. The latter, however, would be

but a natural presumption, producing not constructive belief, but actual conviction, and failing to apply its rule to cases without regard to circumstances, it would be inadequate to the necessities of legal adjudication. Sensible of this, the English judges provided for these necessities by limiting in analogy to their statutes concerning leases and bigamy, the presumption of life to the period of seven years. These statutes are not in force here, nor have we any of our own which correspond to them; consequently the period assumed with us must be an arbitrary one, just as is the period for the presumption of payment, which corresponds with the English Statute of Limitations to bar an entry instead of our own. The period assumed by the English judges, however, is a reasonable one, and we have been cautiously, but constantly, approaching it. That it had not already been arrived at, as in some of our sister States, by direct decision, is to be ascribed to the absence of a case which required it. Such a case now occurs; and the principle is to be considered as definitively settled. But the presumption of death, as a limitation of the presumption of life, must be taken to run exclusively from the termination of the prescribed period; so that the person must be taken to have then been dead, and not before. Indeed that is a necessary conclusion from viewing it, not merely as a limitation, but as a countervailing presumption, which as it does not supplant its predecessor before the end of the period, assumes no more than that the individual and the period expired together; and the predecessor being still in force to rule the case, in respect to the time covered by it, is sufficient to sustain an inference of intermediate existence throughout. Thus the presumption of life continues till it is displaced by a more potent one, which however has no retroactive force; and indeed it would be of little use if it had, for to leave the time of the death still uncertain, would leave a perplexity which it was its purpose to remove. It is undoubtedly true that additional circumstances of probability may justify a presumption that the

death was still sooner; but these, where they operate, introduce a distinct and dissimilar principle. What seems to me to be a palpable error of Chief Justice Denman in *Knight v. Nepean*, on the authority of which the present case was ruled below, is the view he took of the presumption of death, from the efflux of a definite period, as being, in some measure, a natural one, operating within the period and in proportion to its tendency to produce actual belief, and not merely as an artificial one tending to the legal conclusion of a fact without the period, which independently of circumstances a jury is bound to draw. A similar want of attention to its class produces those loose and indeterminate *dicta*, in regard to the presumption of payment, from the lapse of time, which were noticed in *Henderson v. Lewis*.¹ It certainly has not been expressly decided that the person must be taken to have lived throughout the period; but that conclusion inevitably follows from the legal presumption of life, which though prospectively rebutted at a particular period, is sufficient to sustain the allegation of existence during the time it lasted. On the other hand there is no precedent to the contrary; for the presumption in *Watson v. King*, which grew out of the probable fate of a missing ship, rested on circumstances very different from those which are usually connected with the probable fate of an absent individual. In the case at bar therefore we must say there was an error in leaving the jury to presume the death to have been at an intermediate period, unless we discover in the case at least a spark of evidence that the individual was, at some particular date, in contact with a specific peril as a circumstance to quicken the operation of time."

By the civil law, an absentee whose death is not proved is presumed to live until he should have attained the age of one hundred years, which term is regarded as the most remote period of the ordinary life of man. "Death is

never presumed from absence; therefore he who claims an estate on account of a man's death is always held to prove it. An absentee is always reputed living until his death be proved or until one hundred years have elapsed since his birth; although a man be absent, and there be no account of him, his death is not to be presumed; they do not proceed to a division of his estate, for he is presumed to live one hundred years."¹

RULE 44. — An "absentee" within Rule 43 is one who has left his residence, home, or domicil, either temporarily (intending to return) or permanently (intending to establish a fixed residence, home, or domicil elsewhere.) (A). Where the removal is temporary, absence alone, without being heard of, is sufficient to raise the presumption of death within Rule 43. But where it is permanent, without intention to return, the presumption does not arise until inquiry has been made at the fixed residence, home, or domicil² (B).

Illustrations.

A.

I. E. was married to C. in 1847, and lived with him for three years in L., when, on account of his dissipated habits, she left him, and went to live in another place. Here, in 1861, she is married to T., believing C. to be dead. C. turns out to be living. There is no presumption that C. was dead when T. married her, and he is guilty of adultery.³

II. E. was married to S. in New Jersey in 1848. In 1853 she left him, and went to reside in California. In a suit in California in 1868, she testifies that she has not heard of S. since 1850. There is no presumption that S. was dead in 1864.⁴

III. The question is whether A. is alive. It is proved that A. has not been heard of in H. for twenty years. There is no evidence that A.

¹ *Hayes v. Bewick*, 2 Mart. (La.) 131; 5 Am. Dec. 737 (1812); *Watson v. Tindal*, 24 Ga. 494 (1858).

² *Wentworth v. Wentworth*, 71 Me. 83 (1890); *Bailey v. Bailey*, 36 Mich. 185 (1877); *Brown v. Jewett*, 18 N. H. 230 (1846).

³ *Com. v. Thompson*, 11 Allen, 25 (1865).

⁴ *Garwood v. Hasings*, 38 Cal. 229 (1869).

ever established his residence in H. There is no presumption that A. is dead.¹

IV. A. dies in Missouri in 1808. Her son J. is at the time residing in Louisiana. Nothing has been heard in Missouri of J. for over seven years. There is no presumption from this that J. is dead.²

In case I. the trial judge instructed the jury that when a wife departs from her husband and remains absent and distant from him, without knowledge or inquiry respecting him, no presumption of his death arises from the fact that she had not heard from him for seven years, which would justify her in marrying and cohabiting with another man, and justify another man in marrying and cohabiting with her. In the Supreme Court this was affirmed. "The most favorable view," said Dewey, J., "in which this defense could be sustained was that stated in the former opinion, that if it appeared that the husband had absented himself from his wife and remained absent for the space of seven years together, a man who should, under the existence of such circumstances, and not knowing her husband to have been living within that time, in good faith and in the belief that she had no husband, intermarry with her and cohabit with her as his wife, would not by such act be criminally punishable for adultery, although it should subsequently appear that the former husband was still living. But the case is wanting in one of the essential facts stated as the foundation for a right to presume the death of her husband. It is only to the person who leaves his home or place of residence, and is gone more than seven years and not heard of, that this presumption is applicable. Here, the wife went away, and the husband, for aught that appears, remained at Lawrence, or in the vicinity. * * * We see no sufficient ground for any presumption of the death of

¹ Stinchfield v. Emerson, 52 Me. 465 (1860).

² McKee v. Copelin, 2 Cent. L. J. 813 (1875). "Although persons absenting themselves beyond sea or elsewhere for seven years successively are to be presumed dead, yet, as Inlay has not been proven to have so absented himself from the country of his residence, his death ought not in the present contest to be presumed." Spurr v. Trimble, 1 A.K. Marsh. 279 (1818). Presumption of death will not be made as to one who has acquired a home and domicile in another state; and this is known in the State of his former residence. Smith v. Smith, 49 Ala. 156 (1873).

the husband upon which the wife of C. or the defendant could properly have acted. The Superior Court very correctly marked the distinction."

In case II. it was said: "A person who is shown to have been absent from the State or place of his residence for a period of seven years without any intelligence having been received from him by his family, acquaintances, or others who continue in the immediate neighborhood of such residence, is presumed to be dead. Such absence must be shown to have been from his last known place of residence. In this case no such proof is made. It is not shown that Ebenezer Sooy ever acquired a residence in this State; for aught that appears, his residence may have been in the State of New Jersey since his marriage in 1848. The witness, Eliza S. Kinsey, who was married to Sooy in New Jersey in 1848, by her own testimony, is found residing in San Francisco, Cal., as early as 1853, five years after her marriage with Sooy, under an assumed name, since which time she has taken several other names, but so far as shown at no time has she recognized the name of Sooy. Her own testimony raises a very strong probability that since coming to California she endeavored to evade and conceal herself from her first husband Sooy. Under such circumstances I do not think a presumption of Sooy's death can properly arise from her simple statement that she has not seen or heard from him for seventeen years."

B.

I. In 1818 C. left her residence in N. Y. and went to reside in B. She was heard of in 1820 through letters received from her written from B. There is no presumption that she was dead in 1828 from the fact alone that her relatives in N. Y. have not heard from her after 1820.¹

II. In 1840 T. moves his family to Salt Lake City from Kentucky. The fact that they have not been heard from in *Kentucky* for twenty-five years does not raise a presumption that they are dead.²

III. A. left England in 1829 to reside in America. In June, 1831, his brother-in-law received a letter from a stranger in New York soliciting

¹ *McCartee v. Carnel*, 1 Barb. Ch. 463 (1846).

² *Grey v. McDowell*, 6 Bush, 432 (1839).

aid for A., and stating that he had changed his name to B. Three months later A.'s wife sent a letter to A., addressed to B., but the person to whom it was intrusted could not find him. He was not heard of any more, and no subsequent inquiries were made. There is no presumption that A. died in 1888.¹

Even when a person whose existence is in question has remained beyond sea for seven years, it was said in case I., "if he had a known and fixed residence in a foreign country when he was last heard from, he ought not in justice to be presumed dead without some evidence of inquiries having been made for him at such known place of residence without success. For the average duration of life of persons under sixty years of age is more than twice seven years, and in the present state of society in this and other commercial countries no presumption of the death of an individual does in fact arise from the mere circumstance that he has fixed his domicil abroad, and has not been heard of at the place of his birth or of his original residence for more than seven years."

In case III. the vice-chancellor said that unless it was proved or admitted that no further information of A. could be obtained, he could not presume A. dead. Nothing had been shown to have been done in the way of effectual inquiry.

RULE 45. — "Persons who would naturally have heard of him" within Rule 43 is not confined to a particular class; they may be relatives or strangers.²

Illustrations.

I. The question is whether A., who went from Massachusetts to California in 1850, is living in 1860. Evidence that various persons — not relatives of his — had heard from him in 1856 is admissible.³

¹ *Re Creed*, 1 *Drawry*, 225 (1852). But the rule is different where by statute "a person absent for seven years is presumed to be dead." Absence for the time without proof of inquiry is sufficient *prima facie* evidence. *Smith v. Smith*, 5 N. J. Eq. 484 (1846); and see, *Osborn v. Allen*, 26 N. J. L. 288 (1867); *Wambaugh v. Schenck*, 2 N. J. L. 167 (1867).

² *Wentworth v. Wentworth*, 71 Me. 72 (1890); *Bailey v. Bailey*, 26 Mich. 195 (1877).

³ *Flynn v. Coffee*, 12 Allen 138 (1886); *Doe v. Deakin*, 4 B. & Ald. 438 (1821). In *Clarke v. Cummings*, 5 Barb. 258 (1840), it was said: "What is a reasonable search

In case I. it was said that there is no rule of law which confines such intelligence to any particular class of persons. It is not a question of pedigree. "If the demandant's husband had been heard of as living within seven years, though by persons not members of his family, it would certainly affect the presumption upon which she relied."

RULE 46. — "Not been heard of" within Rule 43 means that none of the "persons" referred to in Rule 45 have heard any thing about him which should or would raise a reasonable doubt in his or her mind that he really was no more.

Illustration

I. The life of N. being insured in a life insurance company, an action was brought on the policy in 1874, and the question was whether N. was then dead. He had left his home in England for Australia in 1867, and had not been heard of or seen by any one since, except as follows: A niece of his, one Mrs. C., being in Melbourne in January, 1872, saw a man on the street whom she believed to be her uncle N., but he was lost in the passing crowd, and she was not able to speak to him. She wrote of this to her mother and on returning to England spoke of it to the relatives, but they all thought her mistaken. If the evidence of Mrs. C. was believed, N. had been "heard of" within the seven years; but if it was not believed, on reasonable grounds, then N. had not "been heard of" within the rule.¹

In case I. the trial judge, after telling the jury that not being "heard of" meant that no member of the family had heard anything about him which might raise a reasonable doubt in their minds, whether he was dead, added: "You can not say that a man has never been heard of, when in the first place one of his nearest relations comes and says she saw him alive and well within three years; still less can you

and inquiry for the lives upon the continuance of which the estate of the defendant in this case was made by the terms of the lease to depend, is a mixed question of law and fact to be determined upon the particular circumstances of the case. What would be reasonable in one case might not be in another. I am of the opinion that the circumstances may be such as to render an inquiry of the tenant only a reasonable inquiry. If it were proved that the tenant were the only relation of the person whose life was in question living in the vicinity of the lands, then an inquiry of the tenant would be enough;" and see *Gilleland v. Martin*, 3 McLean, 490 (1844).

¹ *Prudential Assurance Co. v. Edmonds*, 3 App. Cas. 487 (1877).

say that he has never been heard of when every member of the family states that they heard that which is now stated." On appeal this was held error. "The direction," said Lord Chancellor Hatherly, "seems to me to come to this: In the first place, if the jurymen believed Mrs. C.'s assertion to be correct, and thought she had seen him alive and well, of course that ends the case. But then he adds: 'Still less can you say that he has never been heard of when every member of the family states that they heard that which is now stated.' Now as far as that extends, if it remained there, there would have been great reason for the jurymen to infer from that direction that it would be impossible for them whatever might be the value of Mrs. C.'s evidence, to consider the presumption as arising when every member of the family had heard what she said, because, be it true or be it not true, the fact of their having heard it would prevent the assumption arising. I think that would be the reasonable inference from that language; but I think it becomes clearer as you go on, that that would be the interpretation that would force itself upon the mind of the jury, because what the learned lord chief baron goes on to say is this: 'You can not have any one called before you that saw him die, or saw him buried. You have, therefore, no direct evidence, except the evidence that he was alive two or three years ago; on the other hand you have no evidence whatever upon which you could found the presumption that he is dead, that is, that he has never been heard of by any of his relations for the space of seven years, when you find that every one of the relatives has come forward, and every one of the relatives heard that he was alive.' Therefore it appears to me that the lord chief baron plainly and distinctly directed the jurymen that they had no evidence before them at all upon which the presumption of law could arise, because the presumption of law requires that those relatives should not have heard of him, and you find that all those relatives did hear of him. Of course, in reality,

that turns upon whether they believed Mrs. C. or not, and whether the relatives having heard of him from her, they were bound to accept that as knowledge and so the presumption of death should be disposed of. On the other hand, my lords, I apprehend that that is not the law at all. That would not be such a hearing as could lead you to a reasonable ground, for believing that the man was alive within the epoch. I apprehend, my lords, that the jurymen are not here directed, as it appears to me they ought to have been, that the evidence given by the members of the family, as to not having heard of him was fit to found the presumption upon if they came to the conclusion that Mrs. C.'s story was not to be believed. On the contrary, it seems to have been laid down in clear and precise terms, that if every member of the family has heard of him, whether by a credible story or not, then there is a probability of his being alive, and the presumption of death would not arise." And Lord Blackburn in the same case added: "The plaintiff had failed in proving the actual death of Robert Nutt, and then he relied upon the rule of law which is generally laid down in something like these terms: If a man has not been heard of for seven years, that raises the presumption that he is dead. It is generally so enunciated. I do not say that that is the correct way of enunciating it, but I think it may be fairly enough put in those words for this purpose. I think having regard both to the reason of the thing and the decisions, we must take 'not being heard of' in a certain sense. There was seldom or never a man who had reached the age of forty with regard to whom it would not be easy to call scores of people to say, 'I was at school with him, I knew him perfectly well, and I have not heard of him for the last seven years.' But that would not be enough to raise a presumption that he was dead, because if ever so much alive, those people might not have heard of him. My lords, it appears from the case of *Doe*

v. *Andrew*,¹ that it is necessary, in order to raise the presumption, that there should have been an inquiry and search made for the man among those who, if he was alive, would be likely to hear of him. Perhaps it is not quite an analogy, but it is something like the case of a search for documents; before you are allowed to give secondary evidence of a document, you must search the places where the document would in the natural course of things be, if it were still in existence; and having proved that you have done that, you may then give your secondary evidence. In like manner, in order to raise a presumption that a man is dead from his not having been heard of for seven years, you must inquire amongst those, who if he was alive, would be likely to hear of him, and see whether or no there has been such an absence of hearing as would raise the presumption that he was dead. In this case the plaintiff undertook to do that, and called first a witness who said so, but afterward said that he 'had heard a report that a Mrs. C. had seen him' in Australia, but that he did not believe it. I am inclined to think that having heard a report would hardly be such a matter as would prevent the fact of the witness saying he had not heard of him being evidence as far as it went. * * * Supposing the jurymen had found, as a fact, that they thought she was mistaken, would or would not the grounds have existed upon which the presumption from a seven years' absence would arise that the man not heard of was dead? I think certainly they would. It seems to me that when she said, 'I have seen the man in the streets of Melbourne,' it upset the presumption arising from the relatives, including herself, never having seen or heard of him, and it turned the *onus* the other way. It was possible, however, that it might have been proved that the man she saw was not Robert Nutt, but somebody else. If that had been proved it would have left the matter just as if she had never made that statement. When she said she thought she had seen

¹ 15 Q. B. 751.

him, and all the others had heard it from her, although that unexplained and uncontradicted statement affected the *onus*, yet as soon as it was made out by satisfactory evidence that she was mistaken, the hearing from her was gone, and the presumption would remain as it was before. Now, my lords, of course it is essential for the purpose of saying whether the proper direction was given by the judge or not to see what the proper direction would have been, and then to see if that which would have been the proper direction was given to the jury. I think jurymen, who were not lawyers — nay, I think many lawyers themselves, — would be under the impression that the commonly enunciated rule about a man's not being heard of for seven years, would mean that there has not been a physical hearing of him, and that if the relatives had been told of something which happened within the seven years, from which they believed that he was alive, that would be a hearing of him, and that would put an end to the presumption, though it might be proved that the information so brought to the relatives was positively untrue. I can not think that but they might think it. They might imagine that the rule of law was absolute and positive that hearing was enough. If that be so, I take it, that it is clear that the lord chief baron ought to have given them a direction, that in the event of their coming to the conclusion, whether rightly or wrongly, that Mrs. C. was mistaken when she said she saw her uncle, and that she did not see him, then there was an absence of ground for believing that he was alive within the seven years, the period sufficient to raise the presumption. * * * Now what are the jurymen told? They are told, 'not being heard of, means this, that no member of the family has heard any thing about him which might raise a reasonable doubt in their minds whether he must have been no more.' I do not think that in the circumstances that is strictly correct, because I think, though it might raise a reasonable doubt, which would of course shift the presump-

tion, yet the facts might be made clear the other way, and it might be shown that the reasonable doubt was not well founded as in this supposed case. If a respectable person came and said your brother, whom you think to be dead, is alive; I saw him and spoke to him yesterday; every one must feel that would raise a reasonable doubt, and that, if undisputed, it would put an end to the seven years' presumption. But supposing the other side should be able to call witnesses to satisfy the jury that the person who thought that he had seen him was quite mistaken, was deceived, the relatives having previously believed that the man, who had told them he had seen the brother, was telling them the truth, could it be said, after it was proved that the man who told them that had been cheated into the belief that he had seen the brother, could it be said that that evidence, so explained, put an end to the presumption arising at the end of seven years? I apprehend not; yet the wording of the lord chief baron in the first line might have led the jury to think so; and I must acknowledge that when I read the whole through, I think it did lead the jury to think so; whether so meant or not. * * * I have already said that verbal criticism ought not to be applied in a case like this; but looking at the particular circumstances before them, and the particular contention of the plaintiff's counsel, as set out in the bill of exceptions, I can not help thinking that that would be understood by the jury to mean: If Robert Nutt has been heard of, no matter how or where, and even you are satisfied that the hearing was founded upon a mistake, that mere fact of hearing is enough. That I think would be a misdirection. * * * The learned chief baron says: There is no evidence; had he said. Unless you think that the young woman's recognition was mistaken, there is no evidence which would raise the presumption; but if it is proved affirmatively to your minds that she was mistaken, there is evidence which would raise the presumption; — had he said that, it would have been all right."

RULE 47.—The absentee's "residence, home or domicil," within Rule 44 refers to that place which he first departed from, and does not include places where he may have afterward resided or visited.

Illustration.

I. In 1843 C., who resided with his wife and family in H., left there, leaving his wife and family behind. Letters were received from him from parts of Illinois until 1849, since when he was never heard of. The presumption is that C., died in 1856.¹

It was argued in case I. that before the presumption could arise, the party must be proved to be absent from his last residence or place of abode for seven years. But it was answered by the court that if this were so, the longer he was absent the stronger would be the proof that he had changed his domicil, and therefore the proof that he was absent from home would be diminished. The cases do not sustain the distinction contended for nor does it rest on a sound and logical foundation.

RULE 48.—But the presumption will arise that the death of the absentee has occurred before the expiration of the seven years from being last heard of, where any of the following circumstances are shown, viz.: See Rules 49, 50, 51, 52.

RULE 49.—That within that time he was in a desperate state of health.

Illustrations.

I. In 1780, J. left his home for a visit, to return in six months. He was then in a "desperate state of health." He never returned, and was not afterwards heard of. In 1803, the question was whether J. or S., who died in 1785, had survived the other. The presumption is that S. survived J.²

¹ *Winship v. Conner*, 42 N. H. 344 (1861.)

² *Webster v. Birchmore*, 13 Ves. 362 (1807); and see *Eagle's Case*, 3 Abb. (Pr.) 219 (1836); or was of grossly intemperate habits when last heard of. *Stonewell v. Stephens*, 2 Daly, 333 (1868).

II. In July, 1852, H. quitted England for America, and wrote home announcing his safe arrival in New York. He was in declining health when he left home, and from his character and habits would have been likely to have kept up his correspondence. He was never afterwards heard of. In September, 1853, his father died. The presumption is that H. died in his father's lifetime.¹

III. It is shown in a case arising in 1848 that H., whose deposition was taken in 1822, was then fifty-nine years old and in "bad health." This does not rebut the presumption that he is alive, the phrase "bad health" not being specific enough.²

In case III. it was said: "Neither does the circumstance that the witness was in 'bad health' in 1822, infer, as necessary consequence, that he is now dead. The difficulty is here, that the expression 'bad health' is undeterminable. There are manifold sorts of bad health and many degrees in most of them. Show me that H. was the subject of some quick, consuming disease or of any specific malady at all, and you will change the case. Suppose that his bad health was temporary, or that the expression means only that his health was not robust. A man in bad health at one time may recover afterward; that depends entirely upon the nature of his disorder and mode of treatment and vigor of his constitution. And the valetudinarian often prolongs an existence beyond him who in the carelessness of health may be suddenly cut down. "In the case cited from 13 Vesey³ the health was very bad—the chancellor speaks of it as *desperate*."

RULE 50—That within that time he embarked on a vessel which has not since been heard of and is long overdue (A), inquiries having been made at her ports of departure and destination (B).

Illustrations.

A.

I. In 1842, M. sailed on a vessel going from Y. to B. The ordinary voyage from Y. to B. lasts a month. The vessel on which M. sailed

¹ Danby v. Danby, 5 Jur. (N. S.) 54 (1839).

² Re Hall, 1 Wall. Jr. 85 (1842).

³ Webster v. Birchmore.

never reached B. The question being, in 1845, whether M. is now alive, the presumption is that he is dead.¹

II. On March 11, 1841, J. sailed from New York to Liverpool on the steamship *President*. Nothing was ever heard of the ship or of any person who sailed in her after she left the harbor of New York. The ordinary time for steam passages across the Atlantic from New York at this time was fourteen or fifteen days, the longest did not exceed twenty-four days. The ordinary passage of sailing vessels was thirty days, the longest forty. The question is whether J. was alive on May 1, 1841. The presumption is that he was dead at that time.²

III. Captain T. departed with his vessel, *The Helena*, on a voyage, the ordinary limit of which was four months. Seventeen months expired, and nothing was heard of her or the crew. Seventeen months was more than sufficient to have heard from all the commercial ports in the world. The presumption at the end of this time is that the vessel was lost, and that those on board, including Captain T., have perished.³

IV. G. was commander of the United States sloop of war, *Albany*, which left Aspinwall for New York September 28, 1854. Up to November 1, 1855, nothing had been heard of G. or any of the officers or crew of the vessel. In an action brought by G., and pending at that time in the New York courts, judgment was entered in his name on November 27, 1854. Eighteen days is the outside time for a passage from Aspinwall to New York. The presumption is that G. was dead on November 27th, and the judgment is void.⁴

V. On January 27, 1857, M. sailed from Liverpool to Valparaiso. The voyage should have been made in ten weeks. In January, 1858, nothing

¹ *White v. Mann*, 26 Me. 363 (1841); *Patterson v. Black*, Park. on Ins. 919; *Watson v. Maxwell*, 1 Stark. 121 (1815); *Re Hutton*, 1 Curt. 595 (1837); *Re Cook*, Ir. Rep. 5 Eq. 240 (1871); *Eagle's Case*, 3 Abb. Pr. 218 (1836).

² *Oppenheim v. De Wolf*, 3 Sandf. Ch. 571 (1846).

³ *Merritt v. Thompson*, 1 Hilt. 530 (1858). An interesting note is appended to the report of this case as follows: "This case was decided in New York City, April 3, 1858, and five days later the following paragraph appeared in the *New York Tribune*: 'A Lost Captain Found. The New York correspondent of the *Boston Journal* states that some three years ago the report reached New York that the ship *Helena* was lost. Her commander, Captain Thompson, had with him his son, and left in New York his wife and several children. His cargo was a load of coolies; and it was believed that the cargo had risen and murdered the crew. The insurance office paid the policy, and an administrator was appointed for the estate. But Mrs. Thompson has had unwavering faith that her husband and son were alive and would both return. This week a vessel arrived at this port, and states that they passed and hailed a vessel bound for China, which had on board Captain Thompson and crew of the *Helena*. The news has been hailed with joy, and public thanksgiving was given last Sabbath in the Mariner's Church. Upon inquiry, however, this was not the Captain Thompson referred to in the above case; nor has he nor his vessel since been heard of.' The result justified the legal presumption in this case at least."

⁴ *Gerry v. Post*, 13 How. (Pr.) 118 (1855).

has since been heard of the vessel or its crew. The presumption is that M. is dead.¹

In case I. it was said that insurance companies, recognizing the inference, were in the habit of paying insurance on vessels after the lapse of a year when a vessel sailed from an American to a European port and was not heard of. "One who has sailed in a vessel which has never been heard of for such length of time as would be sufficient to allow information to be received from any part of the world to which the vessel or persons on board might have been expected to be carried, and who has never been heard of since the vessel sailed, may be presumed to be dead."

In case II. it was said: "The decisive point is the time of J.'s death. The precise time will never be known till the mighty deep gives up its dead at the last great day. For the purpose in hand we must have recourse to the dictates of common experience and legal presumptions. J. departed from this port on the steamship President, on the 11th day of March, 1841. Nothing has ever been heard of the vessel or of any of her passengers or crew from that day to the present. The usual time for steam passage across the Atlantic from New York has been fourteen or fifteen days, and the longest passages have not exceeded twenty-three or twenty-four days. Forty days is a long passage from hence to England in a sailing vessel of ordinary quality, and the outward trips of our packet ships are seldom beyond thirty days and oftener under twenty-five. These are facts forming a part of the experience and common knowledge of the day, and as such are legitimate ground for the judgment of the court. Now it is very true that the ill-fated President may have become disabled and drifted about for weeks and weeks, before she was finally engulfed by the waves of the Atlantic. But what was her probable fate? A regular and tolerably fair passage would have carried her to England before the last day

of March, 1841. If she had become a wreck and had been buffeted to and fro upon the ocean, the chances would have been greatly in favor of her being seen by some one of the many sail that are constantly passing between the United States and Europe. The fact that she had the recourse of both sails and steam, thus doubling her chance of making some port in case of disaster; and the impenetrable cloud that has always hung over her end, lead the mind irresistibly to the conclusion that she must have gone to the bottom before she had been six weeks out of New York; and the strong probability is that she was lost within a few days after her departure. This is a different question from the one presented, when it is to be determined whether a sufficient time has elapsed to compel payment of an insurance on a missing vessel. Then all the chances in favor of safety are suffered to expire, before the final and last step is taken by the payment of the loss. Here the fact of the death of the party is conceded, and the inquiry is, when did it happen? In the case of the insurance after waiting for a year from the sailing of the missing ship, and then paying the loss, it is not paid on the presumption that the vessel was lost only on the day that payment was made; but on the supposition that she must within the longest customary period allowed for such vessels to reach their port of destination. It is a general rule that if a ship has been missing and no intelligence received of her within a reasonable time after she sailed, it shall be presumed that she foundered at sea. The underwriters are permitted to wait until intelligence of the missing vessel can no longer be reasonably expected. So the Surrogate's Court will delay the grant of administration upon the estate of one who sailed in such a vessel, while hope proclaims a chance of his safety. But when the expectation of tidings of ship and passenger is entirely exhausted, and the underwriter and the surrogate acted upon the legal presumption of the loss of both, that presumption relates back to a time far anterior to the period

when such action takes place. It is a presumption founded upon common sense and experience, and leads to the conclusion that the loss occurred within the longest usual duration of a voyage from the port of departure to that of the ship's destination; because a loss within that time is far more probable than that the vessel after becoming disabled should have drifted about for any considerable period, at the mercy of the waves, without encountering some other vessel or ultimately reaching the land.¹ * * * The authorities fully sustain my conviction that the steamer President must be deemed to have been lost before May, 1841."

In case III. it was said "The presumption of his death does not rest upon the fact that he has not been heard of for seventeen months, but upon the weightier circumstance that the vessel has not been heard of. It is suggested that she may have been lost or destroyed by pirates, and the defendant have survived; that considering the dangerous nature of the navigation in which he was engaged, and the character of the islands of the Pacific where he may have landed, it is not unreasonable to suppose that he may still be living. The supposition that a man may be living is not unreasonable where nothing is known to the contrary, until the natural limit of life has been passed. It is possible that the defendant may be alive, but that would be possible fifty years hence. The question is not whether it is possible he may be alive, but whether the circumstances of this case do not warrant that strong probability of his death upon which a court of justice should act. Forty years after the belief had become universal in Europe that the vessels of La Perouse and all on board of them had perished, discoveries were made rendering it highly probable that he and some of his companions had survived, and had lived for many years on one of the islands, forming part

¹ As to the presumption of the loss of a vessel under such circumstances, see *Houseman v. Thornton*, Holt N. P. 242; *Newby v. Reed*, Park on Ina. 86; *Brown v. Neilson*, 1 Caines, 525.

of the great groups through which the vessel of the defendant must have passed in the successful prosecution of her voyage. The suggestion that La Perouse might still be living, would have availed little in a French court against the claim of the heirs to inherit. It would be presumed that he was dead, for courts of justice do not allow the consideration of possibilities to outweigh a case of strong probability, but adopt and act upon those presumptions which seem most in accordance with the ordinary and usual course of events. Presumption founded in a reasonable probability must prevail against mere possibilities, for were it otherwise the conclusion could never be arrived at that a man was dead, until the natural limit of human life had been reached. Suggestions quite as well entitled to consideration as those now presented to the court have been offered in previous cases;¹ but were not allowed to prevail against the presumption which was deemed the proper and reasonable one under the circumstances. Seventeen months have gone by since the defendant departed upon a voyage, the ordinary limit of which is four months, and nothing having been since heard of the vessel or of those who were on her, the presumption must be that she is lost, and that the defendant and those on board have perished. A greater length of time would strengthen the probability, but sufficient has elapsed to warrant the court in adopting and acting upon that presumption."

In case IV. it was said: "If a tenant for life remove beyond sea or absent himself in this State or elsewhere, for seven years together, he is presumed to be dead. That is a conclusion founded upon mere absence and not being heard of for that time without reference to other circumstances. Other cases are left to depend on the various facts which may be connected with them. A vessel when absent double the longest time of a voyage may be presumed to be lost; and it follows as a consequence that it will also be inferred

¹ See *Tweglow v. Oswin*, 3 Camp. 85; *Green v. Brown*, 3 Strange, 1199

that all perished with her, if none of the passengers or crew are afterwards heard of. In October of last year we were shocked at the news of the loss of the Arctic and most of her crew and passengers. Still hopes were reasonably entertained that some individuals might have been picked up by vessels going to Europe, and until abundant opportunity had passed to hear from all such vessels this hope was properly indulged; and the legal inference might have been until that time was passed that any individual not known to have perished was still alive. But when that last anchor of hope was gone, then the conclusion was that those not heard from had perished—not when hope was last given up—but at the time when from all circumstances it was most probable that they had perished, and would carry us back to the time when the ill-fated vessel and passengers and crew sank together. Thus in earthly as in heavenly things, things invisible to the human eye may be clearly seen, being understood by the things that are known. In this case nearly the same time has elapsed since the Albany left her port destined for this city, and that is the last that has been heard of her, or of any of her crew. The lapse of time makes the death of all on board of her as certain as any thing not seen can be, and throws light on the question, when did that destruction occur? The reasonable answer is, at some time within the period usually assigned as the longest for such a voyage; and it might be from the circumstances that it should be considered as some time while in her ordinary course she would still be in the stormy Gulf of Mexico. Either way it must have occurred before the judgment in this case.”

I. On November 15, 1857, G. S. sailed from Barcelona to Constantinople, the average duration of the voyage being thirty days. The vessel had never arrived at her destination, nor had anything been heard of her or the crew. No inquiries had however been made at Barcelona. There is no presumption that on November 15, 1858, G. S. was dead.¹

¹ *Re Smyth*, 28 L. J. (P. & M.) 1 (1858).

II. On October 20, 1858, B. sailed in command of a vessel from Demerara to London. Nothing was afterward heard of the vessel or crew. No inquiries had been made at Demerara. There is no presumption in March, 1859, that B. was dead.¹

In case I., Creswell, J., said: "I do not find in the affidavits any statement that inquiries have been made at Barcelona or elsewhere about the crew. The affidavits only state that neither the vessel, G. S., nor any of the crew have been heard of. I should undoubtedly presume that the vessel has been lost, but it does not follow that the crew, or some of them, may not have been saved. The case had better stand over until you have written to the agent of the ship at Barcelona and ascertained whether any of the crew have survived."

In case II., the same judge said: "I think probably the vessel is lost, but it does not appear that any inquiries have been made at Demerara as to whether any of the crew have arrived there or have been heard of."

RULE 51. — That at some time within that period he has encountered a "specific peril," which includes not the ordinary dangers of travel or navigation² (A), but some unusual or extraordinary danger (B).

Illustrations.

A.

I. A. died in 1797. In 1791, J. sailed from New York to Europe, and was not subsequently heard from. The question is whether J. survived A. The judge instructs the jury that taking into consideration the hazards of the sea, they may presume that J. died within seven years from the time he sailed from New York. This is error.³

II. In September, 1828, S. sailed as one of the crew of a schooner from Portsmouth, N. H., to the South seas on a sealing voyage. One

¹ *Re Bishop*, 1 Sw. & Tr. 303 (1859).

² *Eagle's Case*, 3 Abb. (Pr.) 230 (1866). "The ordinary perils of navigation are undoubtedly general and not special perils." *Lancaster v. Washington Life Ins. Co.*, 63 Mo. 127 (1878); *Lewis v. Morley*, 4 Dev. & B. (L.) 333; 34 Am. Dec. 379 (1839); *Miller v. Beates*, 3 S. & P. 490; 8 Am. Dec. 638 (1817).

³ *Burr v. Sim*, 4 Wheat. 150; 33 Am. Dec. 50 (1838).

letter was received from him dated April, 1829, but neither S. nor the vessel were ever heard of again. There is no presumption that S. was not alive in September, 1831.¹

III. C. sailed from Boston in 1826 for the West Indies, since which time he was not heard of. He left money in the hands of M., who in April, 1828, loaned it to J. J. pleaded that C. was dead at the time the loan was made. *Held*, that this could not be presumed from his sailing on the voyage and being unheard of.²

IV. S. left the Sandwich Islands in a bark for Manda, May 2, 1855. The bark and those on board were not subsequently seen or heard of. There was no presumption in September, 1856, that S. was dead.³

In case I. it was said: "The circumstance relied on is the departure of the individual by sea; but the perils of the sea are general, not specific; and they are not present but contingent. They are such as may or may not occur; but to accelerate the presumption from time, or more properly to turn it from an artificial into a natural one, it is necessary to bring the person within the range of a particular and an immediate danger—not such as is contingently incident, in some degree, to every mode of conveyance. A natural presumption arises only from a violent probability, because it is a conclusion drawn by experience from the usual current of things; but no violent probability of death arises from a peril, which though possible, is remote. All the examples put by the judge himself are those of special perils which bear directly on the person with greater or less probability of its destruction in proportion to their urgency; and such was the nature of the probability in *Watson v. King*. Now there is no mode of conveyance which has not its perils; and if the mere departure of a person not heard of during the period of legal presumption, were enough to warrant a natural presumption of his death within a more contracted one, the legal presumption, stripped of its deficiency to dispose of the uncertainty it was introduced to remedy, would be deprived of the greater part of its value.

¹ *Smith v. Knowlton*, 11 N. H. 199 (1840).

² *Newman v. Jenkins*, 10 Pick. 515 (1830).

³ *Ashbury v. Saunders*, 8 Cal. 62 (1857).

We are of opinion, therefore, that though the exceptions to other parts of the charge are not legitimate subjects of revision here, the direction that there was evidence from which the jury might infer the death to have been at a time short of the period of legal presumption was erroneous."

In case II., the court said, that they were not aware of any authority upon which the dangers of a sealing voyage would authorize the court to draw a conclusion of death, at the expiration of two years, as to a party who had embarked on such a voyage.

B.

I. J. was the captain of a schooner named The Edmondson, which sailed September 4, 1854, for a port in South America. Neither vessel nor crew were subsequently heard of. A violent storm prevailed along the coast in that year. The question arises whether J. was alive in September, 1857. The presumption is that he was dead.¹

II. M. left New York for Asia in 1840. In 1841 he resided in a town in Asia which was visited by an epidemic. He was not heard of subsequently to 1840. His death may be presumed to have occurred prior to 1847.²

III. A passenger on a vessel, in a weak state of health, disappeared from the vessel while in the middle of the lake on a cold night. The presumption is that he had either by accident or design fallen into the lake and been drowned.³

In case I. it was said: "The rule that the presumption of the continuance of life ceases when the person has been absent and has not been heard of for a period of seven years, it is argued, is a legal presumption and can not aid the defense, because the period limited to sustain it has not expired. If the presumption of death arising from the lapse of time be a legal intendment then the inference is certain, and as a rule of law would be obligatory on the jury; but such a presumption is rebuttable — *presumptio legis tantum*, and may be disproved, either by direct or cir-

¹ *Gibbes v. Vincent*, 11 Rich. (L.) 238 (1858); *Learned v. Corley*, 48 Miss. 709 (1870); and see *Re Norris*, 1 Sw. & Tr. 6 (1856); *Watson v. King*, 1 Stark. 121 (1815).

² See *Eagle's Case*, 3 Abb. (Pr.) 218 (1836).

³ *Lancaster v. Washington Life Ins. Co.*, 68 Mo. 127 (1878).

cumstantial evidence, the effect of which the jury and not court must determine. It is not, however, from the presumption arising alone from the length of time since Johnson has been heard of that his death is inferred, but from the prevalence of a violent storm on the track of his vessel about the time he sailed, and that neither The Edmondson, he nor his crew have since been heard of. The conclusion of his death is inferred from a cause adequate to produce it, coupled with the fact that we have no tidings of him since."

RULE 52. — That his habits, character, domestic relations (A) or necessities (B) would have made it certain that if alive within that period he would have returned to or communicated with his residence, home or domicile.

Illustrations.

A.

I. A. left home for a city in an adjoining State on business, arrived there in safety, and was seen by an acquaintance on the street about three P. M. of the day he arrived. He was never subsequently seen or heard of. It is shown that his character, habits, and domestic relations were unblemished and undisturbed. The presumption arises that his absence is caused by death.¹

In case I. it was said: "Any facts or circumstances relating to the character, habits, affections, attachments, prosperity, and objects in life which usually control the conduct of men and are the motives of their actions, are competent evidence from which may be inferred the death of one absent or unheard from, whatever has been the duration of such absence. A rule excluding such evidence would ignore the motives which prompt human actions and forbid

¹ Tisdale v. Connecticut Mutual Ins. Co., 26 Ia. 170 (1868); 28 Id. 12 (1870); Garden v. Garden, 2 Houst. (Del.) 574 (1863). In 1856 M. disappeared from home. In an action brought in 1864, it was proved that M. had not since been heard of. It was also proved that M. before his disappearance had declared his intention of committing suicide. *Held*, that the presumption was proper that his death occurred about the time of his disappearance.

inquiry into them in order to explain the conduct of men. The true doctrine may be readily illustrated, thus: An honored and upright citizen who through a long life has enjoyed the fullest confidence of all who knew him — prosperous in business and successful in the accumulation of wealth; rich in the affection of wife and children and attached to their society; contented in the enjoyment of his possessions, fond of the associations of his friends, and having that love of country which all good men possess — with no habits or affections contrary to these traits of character — journeys from his home to a distant city, and is never afterward heard of. Must seven years pass, or must it be shown that he was last seen or heard of in peril before his death can be presumed? No greater wrong could be done to the character of the man than to account for his absence, even after the lapse of a few short months, upon the ground of a wanton abandonment of family and friends. He could have lived a good and useful life to but little purpose if those who knew him could even entertain such a suspicion. The reasons that the evidence above mentioned raise a presumption of death are obvious; absence from any other cause, being without motive, and inconsistent with the very nature of the person is improbable. It is suggested that such absence may be on account of insanity. That may be possible, but as death under such circumstances is more probable than insanity in the absence of evidence thereof, the law raises the presumption of death. Evidence which would point toward insanity as the cause of such absence would, of course, be proper for the consideration of the jury, from which its probability might be determined. The competency of evidence of the character above indicated, from which the fact of the death of an absent person may be found within the period of seven years is well sustained by authority.”

B.

I. B., a man of drunken habits, was entitled to dividends on stock payable in April and October. These were his chief maintenance, which he

generally squandered in dissipation as soon as received. He applied for and received his dividends in April, 1860, and was last seen in August of the same year, very sick. He did not apply in October, and was not subsequently seen or heard of. The question was, in 1869, whether he had died before November, 1860. The presumption is that he had.¹

II. In March 25, 1866, S. left her home and was never heard of again. She depended on an income payable in quarterly installments. She did not appear to claim the amount due in June, 1866. In a proceeding in 1875 the presumption is that she was dead after June, 1866.²

III. In May, 1872, J., who was then sixty-six years old, and who was dependent for support upon the income derived under a will, left his house and was never subsequently heard of. A few days previously he had called upon the executor for the money, receiving half a year's income. He was suffering at the time from an incurable disease. The presumption is that he died during the fall of 1872.³

In case I. it was said: "I quite adhere to the general rule laid down in *Doe v. Nepean* and many other cases, that where a person has not been heard of for seven years the *onus probandi* of showing that he died at any particular period within the seven years lies upon the person setting up such earlier death. In the case of *Re Henderson's Trusts*,⁴ which has been referred to, the master of the rolls came to the conclusion that the fact that the person presumed to be dead had not applied for a half-yearly payment of an annuity for which he had hitherto regularly applied, and on which he chiefly depended for his maintenance, was sufficient to lead to the presumption that he died before such payment became due; and that seems to me to be a sound conclusion. Applying the same principle to the present case, B. was of drunken habits, and when last seen was in so emaciated a state that his death might have been expected at any time. How can his never applying for his October dividends be accounted for except on the presumption that he was dead? With regard to the suggestion that he may have gone to America, it appears that he had no means, and

Sheldon v. Ferris, 45 Barb. 123 (1865).

² *Re Beasney*, L. R. 7 Eq. 498 (1869).

³ *Hickman v. Upsall*, 4 Ch. Div. 147 (1876); *Hickman v. Upsall*, 2 Id. 619 (1876); *Hickman v. Upsall*, L. R. 20 Eq. 139 (1875).

⁴ *Re Ackerman*, 3 Redf. 521 (1877).

it is not probable that he would have done so without communicating with his relatives, with whom, notwithstanding his habits, he was on affectionate terms. I therefore come to the conclusion on the facts of this case that B., having made no application for the October dividend, must be presumed to have been then dead."

In case II. James, L. J., said: "The vice-chancellor was of opinion that S. must now be presumed to have died soon after June, 1866, but that it would have been impossible to make such a presumption till after the expiration of seven years from the time when she was last heard of; that is to say, that the circumstance of her going away and not appearing to receive her income in June, 1866, was not in itself sufficient to justify the petitioners in acting on the presumption of her death so as to enable them at that time to apply to be let into possession of the property; but now taking the circumstances under which she disappeared together with the presumption which has arisen at the end of seven years, he has come to the conclusion from these circumstances not only that she is dead, but that she died soon after June, 1866. I think he was right in that way of dealing with that part of the question. And Brett, J., added: "Our decision depends upon the question when S. died. The fact of her not appearing to receive her income was not sufficient evidence of her death; it was not so after the first quarter day; it was not so after the second quarter day. In truth there was no presumption until she had disappeared for seven years; but after seven years having got the fact that she was dead, you have a right to look back and inquire into all the circumstances and ascertain when she died. Suppose a person intending to return home at ten o'clock at night does not appear, there is no presumption that he is dead. But if, after a week he is found with his skull broken in a wood, you can then conclude that he was killed before ten o'clock on the night on which he disappeared. So in the present case I think the vice-chancellor was right in concluding that this lady died at the time at which he says she died."

In case III. it was said that his entire dependence upon the income, his regular and frequent calls for the same before his departure, and his failure to call thereafter, all combined to justify the presumption.

RULE 53. — But the presumption of death at the expiration of seven years from being last heard of, does not arise where it is improbable that the absentee, even if alive, would or could have been heard of at, or would or could have communicated with, his residence, home or domicile (A), or where in other judicial proceedings the absentee is recorded as having been alive subsequently to the end of the seven years (B).

Illustrations.

A.

I. In 1829 L. left her family in England and went to Paris where she took a situation as governess. She continued to correspond with her relatives. In 1835 she wrote to her sister from Paris saying that she was about to accept another situation, and stating that she had become a Catholic. On receipt of this letter her sister replied in a letter or remonstrance reproaching her for her abandonment of the Protestant religion. No reply was received to this letter, and she was not subsequently heard of. There is no presumption that L. died in 1842.¹

II. A girl of sixteen leaves her father's house; later (August 1, 1814) she is in a seaport town, intending to go abroad. She is not subsequently heard of. There is no presumption that in 1821 she is dead.²

¹ *Bowen v. Henderson*, 2 Sim. & G. 360 (1854).

In *McMahon v. McElroy*, Ir. Rep. 5 Eq. 1 (1869), an Irish case, it was said: "The circumstances of the present case are not such as to render it safe to make that presumption at present. Hugh Morgan left Ireland for America some time before the year 1859; resided there for some years; married there; came back to Ireland with his wife in 1859 for a temporary purpose only; he sold all his property in Ireland, and after a few months, returned to America whither his wife and son followed him. It is contended, however, that because he has not since been heard of by his sister, the only member of his family who remains in Ireland, I am therefore, to presume that he is dead. But suppose that an alien comes into this country and stays for a few months, or that a person who is not an alien but has his residence abroad, comes here and stays for a little time, and then leaves, having — to put an extreme case — no relatives here, and is not heard of for seven years, is the presumption, therefore, to be made of his death? I do not think the rule would apply to such cases."

² *Watson v. England*, 14 Sim. 26 (1844).

III. A. was transported from England to New South Wales in 1838 for seven years for a crime. He last wrote to his family on board ship in that year. The records showed that he served his sentence. There is no presumption that he was dead in the year 1850.¹

IV. S. died in August 1858. W., his father, left England for Australia in 1849, from which country he wrote to his wife until 1854, when he ceased to write. In his last letter he said: "I have made up my mind should I reach England in safety, not to know, see or have any communication or connection whatever with any one whom I formerly knew." W. was never subsequently heard of. There is no presumption that he died before S.²

V. A. sailor leaves his ship in a foreign country in 1850, and is not afterward heard of. It is proved that his intention was to desert. There is no presumption that he died in 1857.³

In case I. it was said that the principle on which the presumption that an absent person not heard from for seven years is dead is based is that if he were living he would probably have communicated with some of his friends and relatives. This is a conclusion which courts draw from the probabilities of the case. "It is quite clear, therefore, that when no such probability exists the presumption can not arise. In this case all the circumstances tend to show that after what had taken place between L. and her friends it was extremely improbable she would have entered into further communication with them. She had abandoned her religion, and her friends wrote to her a letter of remonstrance and reproach for so doing. The reproaches were not calculated to encourage further communications. I think this circumstance, taken in connection with the rather eccentric course of life which it appears from her letters she pursued, render it improbable that she would have further communication with her friends. If I am right in this view, it follows that the presumption of her death does not arise from the absence of information or of communication when that absence is natural, even if the lady were still alive."

¹ *Mileham's Trust*, 15 Beav. 507 (1859).

² *Re Smith*, 21 L. J. (P. & M.) 189 (1862).

³ *Lakin v. Lakin*, 34 Beav. 443 (1865); see *Dowley v. Winfield*, 14 Sim. 277 (1844).

In case II. Shadwell, V. C., said: "Here a girl about sixteen or seventeen years of age, whose father was farmer, chose, for some reason which does not appear, to leave her father's house, and to go no one knows whither. But it seems that in August, 1814, she was at Portsmouth, and that she then intended to go abroad. Therefore it is but reasonable to presume that all along she had been concealing herself, and that she never intended to return home. The mere fact of her not having been heard of since 1814 affords no inference of her death; for the circumstances of the case make it very probable that she would never be heard of again by her relations. How can I presume that she died in 1821 from a fact which is quite consistent with her being alive at that time?"

In case IV. it was said: "The evidence is not sufficient to warrant the presumption that W. died before his son. Some expressions used by him in the last letter to his wife would lead to the conclusion that he might have reasons for not again communicating with her."

B.

I. F. was the daughter of G., who died in 1800. In 1788 F. removed from the State, and was not subsequently heard of. In 1825 an administration account was prosecuted and confirmed in which a claim was made and allowed for the "use of F., a daughter of G." This is sufficient to rebut the presumption that G. survived F.¹

II. In case I. a petition filed in 1805 by a son of G. stated that G. had left surviving him twelve children naming F. among them. The return of the sheriff stated that "the parties were severally named." This is also sufficient to rebut the presumption that G. survived F.²

III. The grant of letters of administration raises a presumption of the death of the party.³

¹ Keech v. Rinehardt, 10 Pa. St. 20 (1849).

² Lancaster v. Washington, Life Ins. Co., 63 Mo. 121 (1876); Jenkins v. Peckinpugh, 40 Ind. 133 (1873); French v. Frasier, 7 J. J. Marsh. 431 (1833); Peterkin v. Inloes, 4 Md. 175 (1853).

CHAPTER XI.

THE PRESUMPTION OF SURVIVORSHIP.

RULE 54. — There is no presumption as to the order in which two or more persons died, who are shown to have perished in the same accident, shipwreck or battle. The law regards them as having died at the same instant.

The common law (unlike the civil law in this respect which answers the questions arising out of the death of several persons in a common calamity by recourse to a number of fixed presumptions based on the age, sex, and strength of the parties), does not attempt to ascertain, in the absence of any evidence on which to go, the survivor of a common catastrophe. Strictly it may be said, that the common law presumes neither that one survived nor that all perished at the same moment. But by leaving the matter as one unascertainable, "the practical consequence," as has been said, "is nearly the same as if the law presumed all to have perished at the same moment. It is in fact exactly the same. Where two persons (whether of the same or different ages, sexes or physical conditions) perish in an accident, shipwreck, or battle, and there is no evidence to show which one of the several survived, the law will not raise any presumption from the fact that one was younger or stronger, or of the more hardy sex, that he survived an older or a weaker or a less hardy victim. The party alleging that one survived the other must prove it; the *onus* is on him who claims a right or title upon the

theory of the survivorship of one to prove that fact affirmatively."¹

Illustrations.

I. H. and his wife, while in a railroad car together, are precipitated through a bridge into a river. They are afterwards found dead, and no proof of one surviving the other is presented. Neither transmits any rights to the other, and the heirs of H. must take.²

II. A father and two children were lost in a shipwreck, there being no evidence of survivorship. The next of kin of the children claimed. The burden of showing that they survived their father being upon them, they can not recover.³

III. A father seventy-three years old, and his daughter thirty-three years old, being on board a steamship which was lost at sea, perished in the same calamity, and nothing was shown which tended to prove that one died before the other. The heirs of the daughter can take nothing as coming to her from the father.⁴

IV. A. made a will, leaving some legacies and appointing his wife residuary legatee; she died, leaving several children. A. married again, and had no child. A., with his wife and all his children, afterward were lost at sea. The will is not revoked.⁵

V. T. and his wife perished at sea in the same shipwreck, and there was no evidence who survived. The question arose whether the relatives of the husband or of the wife were entitled to the residue of his estate—*Held*, that the former were.⁶

¹ *Mason v. Mason*, 1 Merivale, 307 (1816); *Wollaston v. Berkeley*, 2 Ch. Div. 218 (1876); *Re Heuss*, 2 Salk. 683; *Re Wheeler*, 37 L. J. (P. & M.) 40; *Robinson v. Sallier*, 2 Woods C. C. 187 (1875). *Contra* *Calvin v. Procurator-General*, 1 Hagg. Ecc. 92 (1827); and see *Durrant v. Friend*, 5 D. G. & Sn. 845 (1852); *Scutton v. Patullo*, L. R. 19 Eq. 375 (1875); *R. v. Hay*, 1 W. Black. 646. This was the celebrated case of General Stanwix, who, with his wife and daughter by a former marriage, perished at sea on a voyage from Dublin to England. Mr. Fearn composed two ingenious arguments, one in favor of each of the claimants, which are printed in his posthumous works. In *Selleck v. Booth*, 1 You. & Coll. C. C. 117, Vice-Chancellor Knight Bruce held that a presumption of priority of death might arise from the comparative age, strength and health of the parties. In this case two brothers perished in a shipwreck; one was the master, the other the second mate of the vessel; and he ruled that the former (the elder) would be presumed to have survived the latter, as being the most experienced sailor. Mr. Taylor (*Ev.*, vol. 1, sec. 160) says of this case that it "can not be relied on as authority, since it is opposed to a long current of decisions."

² *Re Hall*, 12 Ch. L. N. 12, 68 (1879).

³ *Newell v. Nichols*, 12 Hun. 604 (1878).

⁴ *Coye v. Leach*, 8 Metc. 371 (1844).

⁵ *Wright v. Netherwood*, 2 Salk. 592 (1743).

⁶ *Taylor v. Deplock*, 1 Phill. 261 (1815); *Re Selwyn*, 3 Hagg. Ecc. 748 (1831). In this case the court said: "Instances have occurred where, under similar circumstances, the question has been, which of the two survived? But in the absence of clear evidence, it has generally been taken that both died in the same moment." *Re Murray*, 1 Curt. 506 (1837).

VI. A husband and wife were lost with all on board of a packet in the English channel. The next of kin of the husband claims certain property as coming to him as the heir of his wife. There being no evidence that the husband survived the wife, the application is refused.¹

VII. A husband and wife were swept by the same wave into the sea and not afterwards seen. The court can not assume that either survived the other.²

VIII. W. and his wife were killed at the massacre at Cawnpore on or about the 27th of June, 1857. There was no evidence which perished first. There is no presumption that either survived the other.³

IX. Two persons, husband and wife, made separate wills. In the husband's will the property was given to the wife, "and in case my wife shall die in my lifetime, then to W. W. in trust for the children on their coming of age." In the wife's will (made under a power given her by her deceased father, in default of the exercise of which the property was to go to relatives specifically named) property was given to her husband, and "in case my husband should die in my lifetime," then to W. W. absolutely. The husband and wife and two children perished at sea, being all swept off the deck by one wave, and all disappearing together. There is no presumption that the husband had survived the wife or the wife the husband; it is necessary that W. W. should show affirmatively that one or the other had survived, and in the absence of such proof the property goes to the relatives specifically named in the will of the wife's father, as there has been no will by the husband nor any appointment by the wife.⁴

X. A mistress made a will, in which she left her housekeeper the whole of her property. Mistress and housekeeper were murdered at the same time, there being no evidence which one died first. The claimants under the servant could not succeed.⁵

XI. W., her husband and daughter sailed from New York to Europe in March, 1841, in the steamship President. Before this she had procured a policy of insurance on her life for the benefit of her daughter. Neither the President nor any of its passengers were ever subsequently seen or heard of. There is no presumption that the daughter survived her mother.⁶

XII. A mother and an infant son are lost in a shipwreck. The presumption is that they died at the same time.⁷

¹ *Satterthwaite v. Powell*, 1 Curt. 705 (1835).

² *Underwood v. Wing*, 4 DeG. M. & G. 657 (1855).

³ *Re Wainwright*, 1 Sw. & Tr. 257 (1858); *Re Ewart*, *Id.* 253 (1859).

⁴ *Wing v. Ungrave*, 6 H. L. Cas. 183 (1860).

⁵ *See Doe v. Nepean*, 5 B. & C. 92 (1833).

⁶ *Moehring v. Mitchell*, 1 Barb. Ch. 265 (1846).

⁷ *Stinde v. Goodrich*, 3 Redf. 87 (1877); *Re Ridgway*, 4 *Id.* 226 (1880).

XIII. A. and B., husband and wife, are killed in the same casualty, *e. g.*, the wrecking of a railroad train by the giving away of a bridge. The presumption is that they died at the same time.¹

XIV. A father with his two children perished in a shipwreck. There is no presumption either that a particular one of the three survived the other, or that they did not all perish at the same instant.²

In case III. it was said: "The case stands thus: Sylvanus Keith and his daughter, Mrs. Coye, perished in the same disaster. No fact is shown giving the least indication that either party, from the nature of the accident or the position of the parties, had any advantage over the other for protecting life. Nothing is shown of their particular capabilities arising from personal strength or vigor. Nothing indeed is put into the case to control it in favor of either besides age and sex; and these are not decisive tests in the present case. In truth, there is nothing to show that either the father or the daughter survived the other. The evidence * * * fails to show that the estate of Sylvanus Keith ever vested in Caroline E. Coye, his daughter. To effect this it was necessary that she should have survived her father. We do not feel authorized to say that this fact is satisfactorily established. For aught that appears in the present aspect of the case they may both have perished together. This being so, and no arbitrary presumption being authorized by law in such cases arising from age or sex, the consequence is that those who seek to enforce their rights as heirs at law of Caroline E. Coye must fail in establishing their right to a distributive share in the estate of Sylvanus Keith."

"With respect to the priority," said Sir William Wynne in case IV., "it has always appeared to me more fair and reasonable in these unhappy cases to consider all the parties as dying at the same instant of time than to resort to any fanciful supposition of survivorship on account of the degree of robustness. * * * Therefore, taking into consideration

¹ *Kansas Pac. R. Co. v. Miller*, 2 Cal. 443 (1874); *Russell v. Hallett*, 23 Kas. 376 (1890).

² *Newell v. Nichols*, 75 N. Y. 78 (1878).

that there was no wife or child at his death, I pronounce for the will."

In case V. Sir John Nicholl said: "There is no evidence direct as to this point; some inferences have been deduced. It is stated that the two bodies were found together. This tends to show that they were in the same situation at the time of death. Upon the whole, I am not satisfied that proof is adduced that the wife survived. Taking it to be that both died together, the administration is due to the representatives of the husband. I assume that both perished in the same moment, and therefore I grant the administration to the representatives of the husband. I am not deciding that the husband survived the wife."

In case VI. the judge said: "The principle has been frequently acted upon that where a party dies possessed of property that the right to that property passes to his next of kin, unless it be shown to have passed to another by survivorship. Here the next of kin of the husband claims the property which was vested in his wife; that claim must be made out; it must be shown that the husband survived. The property remains where it is found to be vested unless there is evidence to show that it has been divested. The parties in this case must be presumed to have died at the same time, and there being nothing to show that the husband survived his wife, the administration must pass to her next of kin."

In case VII. Mr. Justice Wightman said: "We think there is no conclusion of law upon the subject; in point of fact we think it unlikely that both did actually die at the same moment of time, but there is no evidence to show which of them was the survivor."

"Where two persons," said Lord Chelmsford in case IX., "are at one and the same instant washed into the sea, and disappear together, and are never seen any more, it is not possible for any tribunal called upon judicially to determine the question of survivorship, to form any judgment upon the subject which can be founded upon anything but

mere conjecture derived from age, sex, constitution, or strength of body or mind of each individual, and as our law has not established any rules of presumption for these rare and extraordinary occasions, the uncertainty in which they are involved leaves no greater weight on one side or the other to incline the balance of evidence either way. If, therefore, it is necessary for W. W. to establish his claim under the will of Mrs. U., that he should prove that she survived her husband, he must altogether fail."

In case XIV. it was said: "There is no legal presumption¹ which courts are authorized to act upon that there was a survivor, any more than that there was a particular survivor. It is not claimed that the children died at the same time. Indeed, it may be conceded that it is unlikely that they ceased to breathe at precisely the same instant, and as a physical fact it may perhaps be inferred that they did not. But this does not come up to the standard of proof. The rule is that the law will indulge in no presumption on the subject. It will not raise a presumption by balancing probabilities, either that there was a survivor or who he was. In this respect the common law differs from the civil law. * * * It is regarded as a question of fact to be proved, and evidence merely that two persons perished by such a disaster is not deemed sufficient. If there are other circumstances shown, tending to prove survivorship, courts will then look at the whole case for the purpose of determining the question; but if only the fact of death by a common disaster appears, they will not undertake to solve it on account of the nature of the question and its inherent uncertainty. It is not impossible for two persons to die at the same time, and when exposed to the same peril, under like circumstances. It is not, as a question of probability, very unlikely to happen. At most, the difference can only be a few seconds. The scene passes at once beyond the vision of human penetration,

¹ 75 N. Y. 27.

and it is as unbecoming as it is idle for judicial tribunals to speculate or guess whether during the momentary life struggle one or the other may not have ceased to gasp first, especially when the transmission of the title of property depends upon it; and hence, in the absence of other evidence, the fact is assumed to be unascertainable, and property rights are disposed of as if death occurred at the same time. This is done, not because the fact is proved, or that there is any presumption to that effect, but because there is no evidence and no presumption to the contrary."

RULE 55. — But where the calamity, though common to all, consists of a series of successive events, separated from each other in point of time and character, and each likely to produce death upon the several victims, according to the degree of exposure to it, the difference in age, sex, or health may raise an inference of survivorship.¹

Illustration.

I. C., his daughter H. and son W., each between fifteen and sixteen years old, perish in a shipwreck. The ship struck a rock, and for some hours the passengers worked to lighten her, and to reach places of safety. The father was in very feeble health, and unable to reach the upper deck, which was swept by the waves last, and which the children reached. The presumption is that the father perished first.²

RULE 56. — And the one of several in a common danger which proved fatal to all, who was last seen or heard alive within the operation of the cause of death, is presumed to have survived the others.

Illustrations.

I. C., his daughter H. and son W. perished in a shipwreck. The ship, after striking, was swept by the waves, and C., who was at the time on

¹ See *Ooye v. Leach*, 8 Metc. 371 (1844); *Pell v. Ball*, 1 Cheeves (Eq.), S.C., 99 (1840.)

² See *Smith v. Oroom* 7 Fla. 147 (1857.)

the lower deck, was washed off. Subsequently H. and W. were seen on the upper deck. The presumption is that H. and W. survived their father.¹

II. B. and his wife perished on board a steamboat at sea by the explosion of one of the boilers, which shattered the vessel and caused it to fall to pieces and sink in about half an hour. Mrs. B. was seen and heard calling for her husband after the disaster, but he was not heard to answer, nor was he seen at any time after the explosion. The presumption is that the wife survived the husband.²

III. U., his wife and daughter C. were lost in a shipwreck. A wave swept them from the deck simultaneously. U. and his wife were not afterward seen, but C. was subsequently lashed to a floating spar by a sailor to whom she called. The presumption is that C. survived her parents.³

IV. Father and son were hanged for a crime at the same time. Witnesses observed the son move his legs after the father had apparently become insensible. The presumption is that the son survived.⁴

¹ See *Smith v. Croom*, 7 Fla. 80 (1887.)

² *Pell v. Ball*, 1 Cheves (Eq.) S. O. 99 (1840.)

³ *Underwood v. Wing*, 4 De G. M. & G. 633 (1854.)

⁴ *Broughton v. Randal*, Oro. Elis. 506.

CHAPTER XII.

THE PRESUMPTION OF IDENTITY.

RULE 57.—Identity of name raises a presumption of identity of person, where there is similarity of residence (a) or trade (b) or circumstances (c) or where the name is an unusual one (D); but aliter where the name is a common one and there are several persons known of the same name and of the same place (E).

As has been said, it is fair and legal to presume that the same name identifies the same person until the contrary appears; for names are used for the very purpose of identifying the individuals to whom they are attached.¹

In *Cates v. Loftus*,² two certificates of land, one prior in date to the other, had been granted to one Isaac Larue, and the court held that they would presume that both had been granted to the same person; that the Isaac Larue in the second grant was the same person as in the first. Mills, J., in making this ruling used the following apt language: "It has been truly observed at the bar that the appellee has not ventured to deny that Isaac Larue, to whom the first certificate was granted, is the same person who obtained the last, and although there might have been more of the same name it does not necessarily follow that one of

¹ *Cates v. Loftus*, 3 A. K. Marsh. 302 (1830); *Hamshaw v. Kline*, 57 Pa. St. 397 (1868); *Atchison v. McCulloch*, 5 Watts, 13 (1836); *Bogue v. Bigelow*, 29 Vt. 179 (1857); *Phillips v. Evans*, 64 Mo. 17 (1876); *State v. Moore*, 61 Id. 279 (1876); *Gilt v. Watson*, 18 Id. 374 (1863); *Flournoy v. Warden*, 17 Id. 425; *Brown v. Metz*, 33 Ill. 339 (1864); *Balbec v. Donaldson*, 2 Grant's Cas. 460 (1854); *Brotherline v. Hammond*, 69 Pa. St. 128 (1871); *Hunt v. Stewart*, 7 Ala. 527 (1845); *Douglass v. Dakin*, 46 Cal. 49 (1878); *Trimble v. Brichts*, 10 La. Ann. 778 (1855); *Givens v. Tidmore*, 3 Ala. 745 (1845); *Campbell v. Wallace* 46 Mich. 390 (1881).

² 3 A. K. Marsh. 302 (1830).

these others obtained the first certificate. But we have looked into the testimony and we find no proof of any but one Isaac Larue in the county, or indeed elsewhere, at the date of the certificate, so that we must presume that he is the person who obtained the first certificate as well as the last, unless we should first presume the existence of another, and then that he was the person who obtained the first certificate. Such a presumption would be wholly unnatural and without warrant." Again, in the Michigan case of *Goodell v. Hibbard*,¹ it was said by Graves, C. J.: "The deed from Frank A. Goodell to the plaintiff in ejectment was executed in the State prison, and just before the death of Betsey Goodell, and no direct or express evidence was given to identify him as the Frank A. Goodell of the class described in the will as the minor children of Alexander Goodell, deceased, and objection is made for the want of such proof. We think, in the absence of circumstances to cast doubt upon the fact of identity, the identity of name was enough to raise a presumption of identity of person. The general rule is too obvious and well settled to justify the citation of authorities, and no circumstance appears to affect the operation of this rule, unless the fact that the grantor was in the State prison should be so considered, and we see nothing in that, standing by itself, which should have any force upon the point." So in a recent Texas case it was said: "Similarity of name is said to be some evidence of identity. It can not be questioned that this alone is ordinarily sufficient evidence of identity of a purchaser in a chain of conveyance as the subsequent vendor. Although this case can not be said to come fully within this rule, and it would have been more satisfactory if the marriage of Lyman Tarbox and Jane Carroll had been proved, or that Jane Carroll, to whom the land was conveyed by Lyman Tarbox and Jane M. Tarbox, who subsequently joined him in the conveyance of it to the appellee, was the same

¹ 82 Mich. 55 (1878).

person ; yet we think the partial similarity of name, the possession of the original title papers, etc., sufficient to establish appellee's chain of title." And Lord Ellenborough in an early case said : " The question being whether in an action at law an examined copy of the plaintiff's answer to a bill of discovery in chancery could be read, I must have some evidence of the identity of the parties. But when it is established that the bill in equity was filed by the now defendant against the now plaintiff, I will presume that the answer appearing on the file of the court of chancery was put in by the latter, and I shall hold the examined copy sufficient without the production of the original." ¹

Where it is proved that two parties have the same name the burden is on a person suing one of them to show that the party sued is the one who made the contract or is otherwise liable. This may be shown, however, by indirect evidence, as that of the two the one sued is in business, and the other not, or that the one sued has had former business transactions with the plaintiff, while the other has had none.²

Illustrations.

A.

I. The question is, whether one Samuel Fry, of Plymouth Rock, has written certain letters — he being the defendant in the case. A witness testifies that he knows the handwriting of a Samuel Fry, of Plymouth Rock, the only person of that name at the place. The presumption is that he is the defendant.³

B.

I. S. sues for medicines and attendance furnished by him as a licensed apothecary. Under the law he can not recover unless he is licensed. He produces a license to a person of his name and proves that he practiced as an apothecary. The presumption is that he is the person licensed.⁴

¹ *Hodgkinson v. Willis*, 3 Camp. 401 (1813).

² *Jones v. Parker*, 20 N. H. 21 (1849).

³ *Harrington v. Fry*, 1 Ry. & M. 90 (1824).

⁴ *Simpson v. Dismore*, 9 M. & W. 47 (1841).

II. An action is brought against a pilot named Wm. Henderson, for negligently navigating a vessel. A pilot named Henderson is in court and answers his description. The presumption is that he is the defendant.¹

III. In an action against Charles Lyon for goods sold to his intestate, and a plea of *plene administravit*, the plaintiff, in order to show assets offered a copy of a bill and answer by one Charles Lyon to a bill filed in chancery against him in the character of an administrator. The presumption is that they are the same persons and the evidence is admitted.²

“We find him,” says Parke, B., in case I., “acting as an apothecary, prescribing and dispensing medicines to his patients, and then producing a certificate or license for that purpose in his name from the body empowered by law to grant it. That is quite sufficient evidence of identity.”

In case II. it was said: “The action was brought against William Henderson, a pilot, and a person in court answers to the name of Henderson, and is proved to be a pilot, and to have been the pilot on board the vessel in question. This is evidence from which the jury might assume him to be the defendant. But then the counsel objects that the statement is not made under oath. As to that there are many things which are incapable of strict legal proof. A man’s name is a mere matter of reputation; that which is termed in Scotch law the *status* of a man is matter of reputation, and if precise evidence of the relationship of one man to another or other matters of that nature were always required, no fact of that kind could ever be proved in practice. Here there was evidence of the identity of the defendant although it was not proved directly that the name of the party who answered in court was William. There was evidence that he was a pilot; that he was the pilot on board the vessel, and he answered to the name of Henderson. I think that is sufficient.”

In case III. Lord Ellenborough said: “It is said that the evidence wants a further link to connect it with the defendant, and that it ought to be shown that the Charles Lyon in

¹ *Smith v. Henderson*, 9 M. & W. 818 (1842).

² *Hennell v. Lyon*, 1 B. & Ald. 182 (1817).

the answer was the present litigant. I do not know any way by what that circumstance can be supplied, but by the description in the answer itself, which tallies in almost every particular. Still, however, it may be shown that he is not the same person. The question then is whether public convenience requires that the proof should be given by the plaintiff or the defendant, and I rather think that the public convenience is in favor of the admissibility of this proof, giving the other party an opportunity of showing that he was not the individual named in the answer. It should be taken as proof that he is the person named in the answer until the contrary be shown." And Bayley, J., said: "There is nothing to show two administrations, and it is rather extraordinary to suppose that two persons of the same name should sustain the same character. It is not to be presumed that there are two persons, but the identity is rather to be presumed, unless the plaintiff could have shown the contrary." And Holroyd, J., added: "How does the question stand? The person sued here is Charles Lyon, sued as administrator of Mary Lyon, and the copy of the answer shows that the bill was filed against Charles Lyon, as administrator of Mary Lyon. There is therefore *prima facie* evidence that the Charles Lyon in that court and in this are the same person, which is the only identity wanted."

C.

I. A prisoner is indicted under the name of K. *alias* M. A record of a previous conviction of one K. *alias* M. is produced. The presumption is that they are the same person.¹

II. William J. Douglas is plaintiff in an action. The defendant sets up a judgment obtained in another court against William J. Douglass. The presumption is that they are the same.²

D.

I. An action is brought on a bill of exchange directed to "Charles Banner Crawford, East India House," and accepted "C. B. Crawford."

¹ State v. Kelsoe, 76 Mo. 506 (1882).

² Douglas v. Dakin, 46 Cal. 49 (1873).

A witness proves that the signature was that of a gentleman of that name, formerly a clerk in the East India House, but he does not know whether that Mr. Crawford is the defendant here. The presumption is that the two are the same.¹

II. In an action against one William Leal Evans, for goods sold and delivered, it appears that five years before, a person of that name had been a customer of plaintiff's and had written a letter acknowledging the receipt of the goods. The witness who proves this does not know whether the defendant who answered to the same name is the same person. The presumption is that he is.²

III. An action is brought against Henry Thomas Ryde, as acceptor of a bill of exchange. The cashier of the bank testifies that a person of that name had kept cash at the bank where the bill was made payable, and that the acceptance is in his handwriting. He can not identify him with the defendant of the same name. This is a sufficient *prima facie* case.³

IV. The question is whether the defendant was the Sir J. C. Anderson who had signed a certain bill; a bank clerk testifies that it is in the handwriting of a person who called himself Sir J. C. Anderson, and had two years previous transacted certain business at the bank. The presumption is that they are the same.⁴

V. To an action on a note against Theodore Valney, the Statute of Limitations is pleaded. The plaintiff's attorney testifies that he addressed a letter to the defendant through the post-office, and in response a person of his name came to him, and promised to pay the debt. He was not personally acquainted with the defendant. The presumption is that the person who responded to the letter is the defendant.⁵

“Does the name go for nothing at all in any case?” asked Denman, C. J., in the course of an argument.⁶ “Suppose the name of the defendant had been William Lemuel Gulliver Evans, and a sale had been proved to a party so named.”

In case I. it was said by Abinger, C. B., “I am of opinion that the evidence was quite sufficient. Here the bill is drawn upon by Charles Banner Crawford, and addressed to him at the India House. The evidence is that

¹ Greenshields v. Crawford, 9 M. & W. 314 (1841).

² Sewell v. Evans, 4 Q. B. 636 (1748).

³ Roden v. Ryde, 4 Q. B. 636 (1843).

⁴ Warren v. Anderson, 8 Scott, 384 (1839).

⁵ Kelly v. Valney, 5 Penn. L. J. 300 (1854).

⁶ Sewell v. Evans, 4 Q. B. 636 (1848).

there is a person of the name of Charles Banner Crawford ; that he once belonged to the India House, and that the acceptance is in his handwriting. That is surely sufficient evidence of identity."

"In cases," said Lord Denman, in case III., "where no particular circumstance tends to raise a question as to the party being the same, even identity of name is something from which an inference may be drawn. If the name were only John Smith, which is of very frequent occurrence, there might not be much ground for drawing the conclusion. But Henry Thomas Rhydes are not so numerous, and from that and the circumstances generally, there is every reason to believe that the acceptor and the defendant are identical. * * * Lord Lyndhurst asks,¹ 'why the *onus* of proving a negative in these cases should be thrown upon the defendant ;' the answer is because the proof is so easy. He might come into court and have the witness asked whether he was the man."

"Human tribunals," it was said in case V., "must often proceed upon presumptions. There are many such cases so frequent and familiar as to escape observation. These presumptions are safe, for they are founded upon experience which is the best interpreter as well as judge of actions and events. * * * If the person who called on Mr. A. was not the defendant, there was not merely a fraud, a false personation, but the plaintiff must have procured it. Identity is easily disproved by confronting the party with the witness. * * * The name Theodore Valney is an uncommon one, and the transaction recent."

E.

I. A note signed "Hugh Jones" is sued on. It appears that there are several "Hugh Jones" at the place where the note was signed. and there is no evidence to show that the "Hugh Jones" who is sued is the "Hugh Jones" who signed the note. The plaintiff is non-sued.²

¹ Whitelock v. Musgrove, 3 Tyrw. 543.

² Jones v. Jones, 9 M. & W. 75 (1841).

It was said by Williams, J., in a subsequent case,¹ that in case I. it appeared that the name Hugh Jones in that particular part of Wales was so common as hardly to be a name, and the remarks of Abinger, C. B., bears this out. "The argument of the plaintiff might be correct, if the case had not introduced the existence of many Hugh Jones in the neighborhood where the note was made."

RULE 58. — The fact that the family name and initials are the same raises no presumption that the parties are the same.

Illustrations.

I. A declaration on a promissory note describes it as made by Andrew A. Loudon. The note produced at the trial is signed A. A. Loudon. There is no presumption that the note produced is the one sued on.²

II. Henry V. Libhart brings an action on a judgment in favor of H. V. Libhart. In the absence of any averment that he was known by the latter name or that it was rendered in his favor by that name, there is no presumption of his identity with the plaintiff in such judgment.³

III. One Patrick O'Neil was the owner of a certain piece of land. A deed is signed by P. P. O'Neil. There is no presumption that they are the same persons.⁴

In case I. it was said: "The plaintiff must produce a note and show it to be *prima facie* the note of Andrew A. Loudon. Should he, upon the trial, produce a note signed Andrew A. Loudon, it would fill the allegation in his declaration and make out the case. But suppose the plaintiff produces a note signed Andrew A., will this be sufficient to entitle him to judgment? It may be the note of Andrew A. Loudon. * * * But would it *prima facie* be the note of Andrew A. Loudon? We think not. Suppose the note produced to be signed Loudon, or A. Loudon, the same question would arise. Or suppose it signed A. A. Loudon, does this *prima facie* indicate Andrew A. Loudon? Why

¹ Roden v. Ryde, 4 Q. B. 625 (1843).

² Loudon v. Walpole, 1 Ind. 321 (1848).

³ Bennett v. Libhart, 37 Mich. 489 (1873).

⁴ Burtford v. McQue, 53 Pa. St. 431 (1866).

rather than Abraham or Armstrong or Alexander A. Louden?"

In case II., it was said: "Had Libhart sued upon a note or other written contract made payable to H. V. Libhart, the possession of the writing by him would have been some evidence that he was the party mentioned therein. But there is no room for a similar presumption in the case of the record of a judgment upon which one man can bring suit with the same facility as another, if he will make the averment of identity with the party plaintiff. We have, therefore, nothing in this case to support the judgment, unless we are at liberty to assume as a legal presumption that where the family name and initials are the same there is identity of person. This is going farther than we think is admissible."

RULE 59.—Where two persons of the same name occupy different positions or relations, the presumption is that they are different persons.¹

Illustrations.

I. It is objected that the judge presiding at the time an order was made in a certain cause was one of the counsel in the case at its commencement. Their names are the same. There is no presumption that they are one and the same person.²

II. The deposition of Walter D. Scott is offered, but is objected to on the ground that the defendant and one Walter D. Scott had once been partners. There is no presumption that the witness and the defendant's partner are the same person.³

III. A note is sued on in which the payer and the payee are of the same name. The presumption is that they are different persons.⁴

IV. Two persons, A. and B., are petit jurors in a case. It is proved that there are on the list of grand jurors serving at the same time two persons of the same name. There is no presumption that A. and B., the grand jurors, are A. and B., the petit jurors.⁵

¹ See *Nicholas v. Lansdale*, Litt. Sel. Cas. 21 (1805).

² *Ellsworth v. Moore*, 5 Iowa, 486 (1857).

³ *Cozens v. Gillisple*, 4 Mo. 83 (1835).

⁴ *Cooper v. Poston*, 1 Duv. 92 (1863).

Wickersham v. People, 2 Ill. 128 (1834).

V. A certificate of sale of property for taxes is made to "Michael Dundon," but the deed is made to "Patrick Michael Dundon, Jr." It appears that there are two persons of the name of Dundon, one named Michael, the other Patrick. The deed is not admissible in evidence without proof that the two names were intended for the same person.¹

"The court knows, judicially," it was said in case I., "the judges in the different judicial districts in this State, and will presume, in the absence of any showing to the contrary, that the courts of the District Court are held by such judges, but we cannot know that the attorney, J. D. Thompson, and the Honorable J. D. Thompson, judge of the Thirteenth Judicial District, are one and the same person."

RULE 60. — The initials preceding a surname are presumed to be the initials of a name and not the abbreviations of a title.

Illustrations.

I. It is proved that the Rev. Patrick O'Neil is the owner of a certain piece of land. A deed is produced signed R. P. O'Neil. There is no presumption that they are the same, for the "R" in the deed is presumed to stand for another name, and not to be a contraction for Reverend.²

RULE 61. — Where an interest is claimed, mere identity of name to the person entitled is insufficient.

Illustrations.

I. It appears that one Timothy Mooers is entitled to an interest in an estate. A person of that name brings an action therefor. From the identity of names alone it is held that there is no presumption that the person bringing the suit is the one entitled.³

II. In an action of ejectment J. shows a patent to A. and establishes his descent from a person of that name. The presumption is that J.'s ancestor and A. are the same person.⁴

¹ McMinn v. Whelan, 27 Cal. 800 (1883).

² Burford v. McCue, 53 Pa. St. 431 (1886). So in pleading where an initial is used instead of the full name, it will be presumed to be an abbreviation, and not a different name. Lee v. Mendel, 40 Ill. 359 (1866).

³ Mooers v. Bunker, 29 N. H. 431 (1854).

⁴ Jackson v. King, 5 Cow. 237 (15 Am. Dec. 468). (1825).

“The first thing to be proved,” it was said in case I., “is that the plaintiff is seised of the share he claims of the real estate. If his name is John Smith or John Jones, or any of the common or frequently recurring names, it would be at once apparent that to prove a John Smith to be entitled is but one step to prove the plaintiff’s title; the next is to prove that he is the same person. In the nature of things the same question must arise in every case. It is not often a matter of controversy whether the identity of the plaintiff is established, because the doubt, if any arises, can generally be readily removed. But if the question is made, a jury is not at liberty to presume that a person even of so peculiar name as Timothy Mooers is the same person as the man of the same name who is shown to be entitled to a particular estate.”

RULE 62.—Where father and son, or two persons of different ages, bear the same name, that name when used is presumed to indicate the father or the elder of the two, as the case may be.

Illustrations.

I. An action is brought by Henry Sweeting, the younger, on a promissory note payable to Henry Sweeting. It is proved that there are two persons of this name—father and son. The presumption is that the note is payable to the father.¹

II. An indictment alleges that a woman named therein had committed adultery with one Levi Wallace. It appears that there are a father and son of that name. The presumption is that the father was intended, and evidence of adultery with the son is inadmissible.²

III. A devise was made to John Cluer. The presumption is that it was the father and not the son of that name, who was intended to take.³

¹ Sweeting v. Fowler, 1 Stark. 106 (1815.) Fyffe v. Fyffe, 106 Ill. 646 (1883). In Stebbing v. Spicer, 8 C. B. 827 (1849), this case was followed, but it was held that the presumption was rebutted by the son’s indorsement of the note. And see Kincaid v. Howe, 10 Mass. 203 (1813).

² State v. Vittum, 9 N. H. 519.

³ Jones v. Newman, 1 W. Black. 60.

IV. A deed of land was executed to Joshua Granger. There are two persons of that name living at the time — father and son. The presumption is that the father was the grantee.¹

V. There are two persons of the name of A. B. father and son. An assignment of a land certificate is made to A. B. The presumption is that the father was intended.²

In an English case³ judgment had been obtained against Joseph Jarman, the son of a person of the same name, and *fiery facias* was issued against him without further description, under which the goods of his father were sold. It was held that the writ afforded no justification to the sheriff. "It is undoubtedly true," said Tindal, C. J., "that if the father and son have the same name of baptism and surname, and the name of baptism and surname only be stated in the writ without any addition thereto, *prima facie* the son shall not be intended. But it is equally true that if the action is brought against the son without any addition, and such want of addition is not pleaded in abatement, a judgment obtained in such action against the son, and a writ of execution upon such judgment are good against him by the name inserted in the writ. Although, therefore the want of addition imports *prima facie* that the son is not intended, it is no more than a *prima facie* intention, for the son may be the person really intended by the writ. The situation, therefore, of the sheriff, under such a state of circumstances, seems to be the same as if he had received a writ against a defendant described by the name of J. S. in the writ, and there appeared at the time of executing the writ to be two persons of the name of J. S.; in which case there can be no doubt but that the sheriff would be liable, if, through inadvertency or mistake, he took the person or the goods of the wrong J. S." In the New Hampshire case, on the other hand (case II.), it was held that a crime being charged, the presumption was not rebut-

¹ *Stevens v. West*, 6 Jones (L.) 50 (1858); *Graves v. Colwell*, 90 Ill. 615 (1878.)

² *Brown v. Benight*, 3 Blackf. 39; 23 Am. Dec. 373 (1832). *Leptot v. Browne* 18 Ark. 7.

³ *Jarman v. Cooper*, 6 M. & 333 (1843).

table. The woman was accused of adultery with Levi Wallace, and there were two Levi Wallaces — father and son. “The question then is,” said the court, “whether the respondent is informed by this indictment that she is accused of adultery with the individual to whom the evidence related, or whether she is in fact informed by it that she is accused of intercourse with Levi Wallace, the elder. There can be no doubt that evidence to prove that the respondent had been guilty of adultery with Levi Wallace, the elder, must have been admitted, if it had been offered at the trial of this indictment. If evidence of adultery with Levi Wallace, junior, was rightfully admitted, it would present a case where proof that the respondent had been guilty of the offense with either of one of two individuals might be offered under an indictment which charged an offense with one only. That cases of this kind may occur there is no doubt. Where there are two or more individuals of the same name residing in a town who have no usual addition to designate one from the other, it may result from the nature of the case. And perhaps the same may be true where there is merely a territorial designation sometimes used to distinguish different individuals of the same name, but not used by either of them for that purpose.¹ But where there are two persons of the same name, father and son, residing in the same town, and the latter uses a well known addition to his name, as ‘junior’ or ‘younger’ to designate him from his father, and he is usually known by such designation, we are of an opinion that an indictment, in order to allege any offense as committed with him or upon him, should connect with his name the ordinary addition which is by himself and others used to distinguish him from his father, and that in the absence of such addition, the indictment must be understood to allege the offense to have been committed with or upon the latter.” But the same rule, it seems, does not apply to mother and daughter.²

¹ *Colt v. Starkweather*, 8 Conn. 203.

² *R. v. Pease*, 3 B. & Ald. 579 (1830), and see *R. v. Bailey*, 7 C. & P. 261 (1835).

In case IV., though the parties were father and son, a more extended principle was announced by the court in conformity with the rule as stated above. "The rule," said Battle, J., "may be laid down more broadly, that in all cases where there are two persons having the same name, whether they stand to each other in relation of father and son or not, the elder is always presumed to be meant when there is no addition to the name. The reason is, that when one has a particular name, and afterwards there is a younger person to whom the same name is given, the first does not thereby cease to be known by that appellation, but the latter must be distinguished from him by the addition of 'junior,' or perhaps in some other way."

RULE 63. — And the identity of things may be presumed from circumstances.¹

Illustrations.

I. A certain case is proved to have been on a certain day removed from a justice's court to the Supreme court. A subsequent order of the Supreme Court dismissing from its docket a cause having the same title is introduced. The presumption is that it is the same cause.²

II. A contract to convey "a house on Church Street" is dated at Boston. The presumption is that the house is situated in Boston.³

III. An action is brought on a note made by B. to C. The action is barred by limitation, but C. relies on a new promise. The promise is made in a letter in which B acknowledges and undertakes to pay "his debt." The presumption is that this refers to the debt sued on.⁴

¹ *Morris v. Landauer*, 48 Iowa, 234 (1878); *Byrd v. Fleming*, 4 Bibb. 145 (1815); *Beatty v. Michon*, 9 La. Ann. 102 (1854).

² *Howard v. Rockwell*, 1 Doug. (Mich.) 315 (1844).

³ *Mead v. Parker*, 115 Mass. 413 (1874).

⁴ *Coles v. Kelsey*, 2 Tex. 541; 47 Am. Dec. 661; (1847).

CHAPTER XIII.

THE PRESUMPTION OF INTENT.

RULE 64.—Where a person does an act, he is presumed in so doing to have intended that the natural (A) and legal (B) consequences of his act shall result.¹

Illustrations.

A.

I. W. wrote and published of H. that he had colluded with an insolvent tenant in setting up a fictitious distress. In an action of libel brought by H. against W. the judge leaves it to the jury to say whether W. intended to injure H. by the publication. This is error because the tendency of the libel being injurious to H., W. is presumed to have intended it to be so.

II. A baker is charged with delivering adulterated bread for the use of a public asylum. It is proved that A. delivered the bread. The presumption is that he intended it to be eaten.²

III. B. is charged with setting fire to a building with intent to injure the owner. It is proved that B. fired the building. The presumption arises that he intended to injure the owner.³

IV. A debtor knowing himself to be insolvent, executes a bill of sale and an assignment of his book accounts to one of his creditors. The presumption is that this was done with the intention of giving a preference to such creditor.⁴

V. A married man enters a house of prostitution and remains there all night. The presumption is that he committed adultery while there.

¹ *State v. Hessenkamp*, 17 Iowa, 25 (1864); *State v. Presnell*, 13 Ired. (L.) 105 (1851); *Hayes v. State*, 58 Ga. 47 (1877); *Hoskins v. State*, 11 *Id.* 92 (1862); *Lawrence v. State*, 68 Ga. 289 (1881). "Every man acting intelligently will be presumed to intend the necessary consequences of his acts." *Holmes v. Holmes, etc., Manufg. Co.*, 37 Conn. 278 (1870). But a party is not presumed to intend remote consequences of his acts. *Nicol v. Crittenden*, 55 Ga. 497 (1875).

² *Haile v. Wilson*, 9 B. & C. 643 (1829); *King v. Harvey*, 3 D. & R. 464 (1823).

³ *King v. Dixon*, 3 M. & S. 13 (1814).

⁴ *R. v. Fanning*, R. & R. 207 (1811).

⁵ *Ecker v. McAllister*, 45 Md. 290 (1876); *Gardner v. Lewis*, 7 Gall. 377 (1848).

⁶ *Evans v. Evans*, 41 Cal. 103 (1871); *Astley v. Astley*, 1 Hagg. Eco. 720 (1828).

VI. A wife who resided in Massachusetts goes to Maine and immediately applies for and obtains a divorce for causes not a ground for divorce in Massachusetts. The presumption arises that her purpose in removing to Maine was to obtain a divorce.¹

VII. A statute provides that certain conveyances made with intent to give a preference to certain creditors shall be void. A. makes a conveyance whose provisions prefer certain creditors. The presumption is that A. intended to give a preference.²

"The judge," said Tenterden, C. J., in case I., "ought not to have left it as a question to the jury whether the defendant intended to injure the plaintiff, for every man must be presumed to intend the natural and ordinary consequences of his own act." And Littledale, J., added: "If the tendency of the publication was injurious to the plaintiff, then the law will presume that the defendant, by publishing it, intended to produce the injury which it was calculated to effect."

In case II. Lord Ellenborough said, that it was a universal principle that when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act, and here it was alleged that he delivered the loaves for the use and supply of the children, which could only mean for the children to eat, for otherwise they would not be for their use and supply.

In case VII., Shaw, C. J., said: "But the statute provides that the acts which it prohibits must be done with an intention to give a preference. The intent to prefer is essential, but every person is to be presumed to intend the natural and probable consequences of his own acts, and if such acts do in fact as this do give a very large preference, it is competent for the jury to infer the intent. It does not rebut this intent to show that the debtor has also another motive to the proceeding, namely, an expectation of pecuniary or other future benefit to himself by means of further loans of money, and being enabled thereby to continue his business."

¹ Chase v. Chase, 6 Gray, 157 (1856).

² Denny v. Dana, 2 Oush. 160 (1848); Beals v. Clark, 13 Gray, 18 (1859).

B.

I. A., B., and C. sign a note "as trustees" of a church, it being represented to them that no individual liability could arise from their act. But the law considers a note so signed as binding the signer personally. The presumption is that A., B., and C. intended to bind themselves personally.¹

II. A., who holds two claims against B., gives him a release under seal of one and a simple receipt of payment of the other. The presumption is that A. intended that the former should be conclusive, and that the latter should not.²

III. A debtor makes a fraudulent preference by assignment of his property. He makes also a "conveyance of his property for the benefit of creditors." The law presumes that the intent of the conveyance was to delay or defraud his creditors.³

IV. A. forges the name of B. to a bill of exchange and negotiates it. The presumption is that A. intended to defraud B., and his intention to pay it when it became due is irrelevant.⁴

V. B. forges C.'s name to a check on the bank of D. C. has no account there. The presumption is that B. intended to defraud C.⁵

VI. A. was employed by B. to purchase stock to a certain amount. A. gave B. a forged receipt for stock for that amount. The presumption is that A. did this with the intention of defrauding B., and B.'s opinion that he did not intend to defraud is irrelevant.⁶

VII. C. is indicted for issuing a forged bank-note with intent to defraud the bank. The note was issued by C. to a third person, and it appeared that its execution was such as to render its spuriousness easily detectable by the officers of the bank who must examine it before paying it; but this an ordinary person would not discover. C. is presumed to have intended to defraud the bank.⁷

VIII. A. sets fire to a building. The presumption is that he intended to destroy it.⁸

IX. A. gives a promissory note to B. The presumption is that A. and B. intended that the note should be paid in legal currency.⁹

X. A statute provides that the failure to pay over money by a public officer shall be punishable; a public officer is indicted for failing to turn

¹ *Mears v. Graham*, 8 Blackf. 144 (1846); *Burrit v. Dickson*, 8 Cal. 113 (1157).

² *Jones v. Ricketts*, 7 Md. 108 (1854).

³ *Ex parte Villars*, L. R. 9 Ch. App. 443 (1874).

⁴ *R. v. Hill*, 3 Moody, 30 (1838).

⁵ *R. v. Nash*, 3 Den. C. C. 498 (1852).

⁶ *R. v. Sheppard*, R. & R. 180 (1809).

⁷ *R. v. Masagora*, R. & R. 201 (1815).

⁸ *People v. Orcutt*, 1 Park. C. C. 252 (1861).

⁹ *Williams v. Boozeman*, 18 La. Ann. 533 (1866).

over a license fee collected by him. The presumption is that his failure was willful and intentional.¹

In case II. it was said: "When the law ascribes to one instrument a conclusive and to another a *prima facie* character, we must presume that parties using either intend it to operate according to its legal effect. A release will discharge a debt when a receipt will not. Persons may settle in good faith under the impression that the amount paid is all that is due. But it sometimes happens that mistakes occur, and to enable parties to correct them the law has declared that mere receipts are not conclusive."

In case III. Lord Chancellor Cairns said: "It is true that under this, as under previous statutes of bankruptcy, two acts are specified which if done by the bankrupt are not only acts of bankruptcy, but are also, if followed by bankruptcy, void. One is a conveyance or assignment of the bankrupt's property for the benefit of creditors, and the other is a conveyance or assignment fraudulent or by way of fraudulent preference. It is to be observed as to one of these acts, namely, a conveyance or assignment by way of fraudulent preference, special provisions have always been made in bankruptcy legislation, making such a conveyance or assignment void by express enactment, and reducing it accordingly; and as to the other, namely, a conveyance in trust for all creditors, it has been held from the earliest times of bankruptcy law, that as the effect of such a conveyance must be to delay or defeat creditors, the law will presume an intention to delay or defeat creditors, and the conveyance would therefore be invalid as against, and perhaps even without reference to the policy of the bankruptcy laws."

"The recorder," said Maule, J., in case V., "seems to have thought that in order to prove an intent to defraud, there should have been some person defrauded or who might possibly have been defrauded. But I do not think that at all necessary. A man may have an intent to

¹ *State v. Heaton*, 77 N. C. 504 (1877).

defraud and yet there may not be any person who could be defrauded by his act. Suppose a person with a good account at his bankers, and a friend with his knowledge forges his name to a check, either to try his credit or to imitate his handwriting, there would be no intent to defraud, though there might be parties who might be defrauded; but where another person has no account at his bankers, but a man supposes that he has, and on that supposition forges his name, there would be an intent to defraud in that case, although no person could be defrauded."

In case X. it was said: "As men do not generally violate the criminal code, the law presumes every man innocent, and this presumption of innocence is to be observed by the jury in every case. But some men do violate the law, and as they seldom do unlawful acts with innocent intentions, the law therefore presumes every act in itself unlawful to have been criminally intended until the contrary appears. A familiar example is on the trial of a case of homicide. Malice is presumed from the fact of killing, and the burden of disproving the malice is thrown upon the accused. The same principle pervades the law in civil as well as criminal actions. Indeed, if this were not so the administration of the criminal law would be practically defeated, as there is in most cases no other way of sustaining the intent than by establishing the unlawfulness of the act.

RULE 65.—Where an act is criminal *per se* a criminal intent is presumed from the commission of the act.¹

Illustrations.

I. N. is proved to have been stabbed with a dirk knife by T., from which wound he instantly died. T. is presumed to have intended to kill N.²

¹ *People v. March*, 6 Cal. 548 (1856); *Murphy v. Com.* 23 Gratt. 960 (1878); *McCone v. High*, 24 Iowa, 336 (1868); *Murphy v. State*, 37 Ala. 142 (1861); *Carroll v. State*, 23 Ala. 23 (1853).

² *Com. v. York*, 9 Metc. 98 (1845); *Murphy v. People*, 37 Ill. 447 (1865); *Riggs v. State*, 30 Miss. 636 (1856); *State v. Bertrand*, 3 Oregon, 61 (1868); *State v. Holme*, 54 Mo. 158 (1878); *Conner v. State*, 4 Yerg. 137 (1833).

II. S. shoots at C. who is on horseback. The ball takes effect on C. and kills him. S. testifies that he shot at C. intending only that his horse should throw him. The presumption is that S. intended to kill C.¹

In *Commonwealth v. Webster*,² Chief Justice Shaw said: "The ordinary feelings, passions, and propensities under which parties act are facts, known by observation and experience; and they are so uniform in their operation that a conclusion may be safely drawn that if a person acts in a particular manner he does so under the influence of a particular motive. Indeed, this is the only mode in which a large class of crimes can be proved. I mean crimes which consist not merely in an act done, but in the motive and intent with which they are done. But this intent is a secret of the heart which can only be directly known to the searcher of all hearts; and if the accused makes no declaration on the subject, and chooses to keep his own secret, which he is likely to do if his purposes are criminal, such criminal intent may be inferred and often is safely inferred from his conduct and external acts."

Said Chief Justice Shaw, in case I.: "A sane man, a voluntary agent, acting upon motives must be presumed to contemplate and intend the necessary, natural and probable consequences of his own acts. If, therefore, one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life. So, if the direct tendency of the wilful act is to do another some great bodily harm, and death in fact follows as a natural and probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used with violence upon the person of another, as this has a direct tendency to destroy life, or do some great bodily harm to the person assailed,

¹ *State v. Smith*, 2 Strobbh. 77 (1847).

² 5 Oush. 316 (1850).

the intention to take life or do him some great bodily harm is a necessary conclusion from the act." And to the same effect is the language of the chief justice of Pennsylvania: "He who uses upon the body of another at some vital part, with a manifest intention to use it upon him, a deadly weapon, as an ax, a gun, a knife, or a pistol, must in the absence of qualifying facts be presumed to know that his blow is likely to kill; and knowing this must be presumed to intend the death which is the probable and ordinary consequence of such an act."¹

In case II. it was said: "If one were to fire a loaded gun into a crowd, or throw a piece of heavy timber from the top of a house into a street filled with people, the law would infer malice from the wickedness of the act; so, also, the law will imply that the prisoner intended the natural and probable consequence of his own act, as in the case of shooting a gun into a crowd, the law will imply from the wantonness of the act that he intended to kill some one, though it might have been done in sport. If the prisoner's object had been nothing more than to make Carter's horse throw him, and he had used such means only as were appropriate to that end, then there would have been some reason for applying to his case the distinction. * * * But in this case the act indicated an intention to kill—it was calculated to produce that effect and no other—death was the probable consequence and did result from it.

"If a man raises his rifle and deliberately fires its contents into the bosom of another, or by a blow with an ax, which might fell an ox, buries it into the brain of another, the inference from the act is irresistible that death was meant, and so the law presumes.

"The inferences of the mind, which are equally presumptions of law, are certain and conclusive in proportion as the acts, from their nature and character, are certain to result in death.

¹ Agnew, C. J., in *Com. v. Drum*, 58 Pa. St. 17 (1868).

“Thus, the plunging of a poignard into the heart of another, we do not doubt, was intended to kill, but if aimed only at the arm or leg, though death may be the result, yet the mere fact of giving such a blow, so long as that is the only criterion by which we judge, renders the intent more doubtful and the inference less strong. So, if one beat a full-grown man with his fist, and death ensues, we would ordinarily feel far more doubt that death was intended than if it had been produced by the use of a dangerous weapon. So, too, regard may be had to the relative strength and powers of endurance of the parties as well as to the mode in which the violence is applied.

“A powerful blow given by the fist alone (but not repeated) upon the head of a full-grown man would not ordinarily be regarded as intended to produce death; but what else could be inferred if the same blow were planted upon the temple of an infant child?

“In many cases the inference that death is intended is as strong when perpetrated by a drunken as when perpetrated by a sober man. Thus, if by a deadly weapon, as by a rifle or a bowie knife, a bullet or blow is sent directly or designedly to some vital spot, we should infer that death was intended with almost equal certainty, whether the perpetrator were drunk or sober. So, too, when death is produced by poison, and we see in the mode of its administration stealthy calculation, we would infer that death was intended, whether he who administers the poison was in a state of sobriety or intoxication, since in the very character of the act we could read design.

“But we also know that intoxication produces more effect upon the nervous system of some than of others. It clouds and obscures the judgment of one more than it does another. It produces greater extravagance of exertion and action in some than it does in others, and sometimes consequences result from such extravagant exertion and action of which the party himself had no idea. All these things are to be

considered by this jury in determining upon this question of intent."

The rule that a man must be supposed to intend the natural results of his act is said by Hubbard, J., to be by no means an infallible proposition, though often treated as an axiom. "The result is not always evidence of the supposed intent. When we look back upon events that have happened we stand in a different position, we behold with a clearer vision, as we embrace within our glance the beginning and the end, the act and the consequence. But the man who is doing the act may contemplate a very different result. His feelings may be biassed by his wishes, and sanguine feelings may be the cause of overlooking difficulties which to a more quiet temperament might appear insurmountable. Disappointments also may take place which were not anticipated.¹

"It has been urged," said Comstock, J., in *Curtis v. Leavitt*,² "that the debtor corporation must be deemed to have intended the result of its own acts. This is very often a useful rule of evidence in arriving at a conclusion upon a question of motive and intention, but it is not a rule of law. If a given result must, by plain and absolute necessity, follow from a particular action, or if it be so likely to follow that no two minds of equal intelligence could differ in conclusion, viewing the subject from the same point of observation as the actor himself, then there would be no injustice in holding that he intended such result. Still, the question is one of fact; what was the intent?"

And in *Quinebaug Bank v. Brewster*,³ Sanford, J., said: "The intention of a party is a fact to be proved as all other facts are proved, not, indeed, necessarily by direct evidence or by the proof of other facts indicative of such

¹ *Jones v. Howland*, 9 Metc. 306 (1844).

² 15 N. Y. 1 (1857).

³ 30 Conn. 559 (1862).

intention, and from which facts its actual existence and operation may be inferred. The law makes no conclusive presumption in regard to it. Indeed, the law never conclusively presumes that a person intended to violate the law or commit a fraud. The act done and the circumstances attending its commission may indicate more or less clearly the intention of the party doing it, and authorize an inference of more or less weight in regard to such intention."

RULE 66. — But when a specific intent is required to make an act an offense, the doing of the act does not raise a presumption that it was done with the specific intent.

Illustrations.

I. R. is charged with assaulting with intent to murder one E. It is proved that R. fired a loaded pistol at E. There is no presumption that R. intended to murder E.¹

II. A statute makes a willful, deliberate and premeditated killing murder in the first degree. B. kills C. There is no presumption that the killing was deliberate and premeditated.²

In case I. it was said: "The general rule is well settled, to which there are few if any exceptions, that when a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself and must be found by the jury, as matter of fact, before a conviction can be had. But especially when the offense created by the statute, consisting of the act and the intent, constitutes as in the present case, substantially an attempt to commit some higher offense than that which the defendant has succeeded in accomplishing by it, we are aware of no well founded exceptions to the rule above stated, and in all such cases the particular intent

¹ *Roberts v. People*, 19 Mich. 401 (1870); *Mayher v. People*, 10 Id. 313 (1863).

² *Com. v. Drum*, 58 Pa. St. 9 (1876); *State v. Mitchell*, 64 Mo. 191 (1876); *State v. Foster*, 61 Id. 549 (1876); *State v. Lane*, 64 Id. 319 (1876); *Hamby v. State*, 36 Texas, 523 (1872).

must be proved to the satisfaction of the jury; and no intent in law or mere legal presumption differing from the intent in fact, can be allowed to supply the place of the latter."

RULE 67. — The law presumes an intent from acts in the absence of declarations(A) where the party is physically and mentally capable of forming an intent (B.)

Illustrations.

A.

I. The question is whether a certain incumbrance was intended to be excepted from a covenant against incumbrances in a deed. It appears that the incumbrance in question was notorious and of long standing, and no mention of it was made in the deed. The presumption is that it was intended to be excepted.¹

II. In case I. it appeared that nothing was said by the parties in reference to the incumbrance. The presumption of an intention not to except it is not raised from this fact alone.²

In case I. it was said: "From the existence and notoriety of the incumbrance, its long standing and the long acquaintance of the parties with it as a permanent thing, the fact that no mention was made of it in the negotiation, though other incumbrances were mentioned in the deed and excepted, the committee drew the inference that it was the intention of the parties that it should be excepted from the deed. * * * The argument in favor of the finding of the committee is very strong. An express warranty on the sale of personal chattels does not apply to visible defects, because the fact that the defect was plainly visible is evidence that the purchaser knew it, and did not take his warranty on account of it. This principle does not apply in the case of a warranty by deed, because the terms of a deed can not be contradicted or varied by parol, and undoubtedly a man may, if he will be so foolhardy, make an express

¹ Knapp v. White, 23 Conn. 529 (1855).

² *Id.*

warranty in a deed, where he knows that it is broken at the moment the deed is delivered, and knows also that the fact is well known to the party to whom he gives it. But ordinarily we suppose that parties do not in this open way intentionally involve themselves in lawsuits. And we do not see why the plain, open, visible, and notorious character of this incumbrance, connected as it was with full knowledge of the parties of its existence, does not furnish evidence that it was not intended by the parties to be warranted against, upon a principle analogous to that which applies to visible defects in the sale of personal chattels by parol."

In case II. it was said: "The defendant's counsel seem to suppose that there could have been no intention to except the right to maintain the ditch from the deed, because the parties said nothing about it. But courts will often found decisions and judgments upon the presumed intention of the parties where nothing has been said. A man is presumed to intend the natural and probable consequence of what he does: and on the principle many persons have been found guilty of the highest crimes. A man is presumed to accept of a conveyance of property made to him, on the ground that it being for his benefit he would naturally wish to receive it; and on this principle titles have been established. Indeed we always draw inferences from our observation of the usual habits of men which lead to a great variety of presumptions. These inferences are the conclusions drawn by reason and common sense from premises established by proof; and are as applicable to questions of intention where the intention of parties becomes important as to any other disputable fact. It is true, as remarked by Judge Story, that if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief on the ground that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable

controversy. But this does not mean that there must always exist direct and positive proof that the instrument does not express the true intent of the parties in order to justify the court in reforming it. To give any such construction to the rule would be to deny any right in a court of equity to interfere unless the instrument could be shown to vary from written memoranda of the terms of the contract from which it is drawn up, or some evidence equally decisive. We do not so understand the rule."

B.

I. A. is indicted for burglary. It is proved that A. broke and entered a store in the night-time. The presumption is that A. intended to commit a burglary. A. shows that he was at the time too drunk to have entertained such an intent. The presumption of intent no longer arises.¹

II. R. is indicted for shooting at S. with intent to kill him. R. shot at S. while in a state of intoxication. The guilt of R. turns on the question whether R. was in such a state of mind as to be able to form an intent.²

In case II. Coleridge, J., said: "There are two points for your consideration, first, as to the act; second, as to the intent. With regard to the latter, the allegation respecting it in the indictment must, no doubt, be proved to your satisfaction before you can find the prisoner guilty upon the full charge. The inquiry as to intent is far less simple than that as to whether an act has been committed, because you can not look into a man's mind to see what was passing there at any given time. What he intends can only be judged of by what he does or says, and if he says nothing then his acts alone must guide you to your decision. It is a general rule in criminal law, and one founded on common sense, that juries are to presume a man to do what is the natural consequence of his act. The consequence is some-

¹ *Ingalls v. State*, 48 Wis. 647 (1879); *Wood v. State*, 34 Ark. 341 (1879); *Roberts v. People*, 19 Mich. 401 (1870); *State v. Bell*, 29 Iowa, 316 (1870); *State v. Maxwell*, 43 Id. 208 (1875); *Wens v. State*, 1 Tex. App. 38 (1876); *Loza v. State*, Id. 438 (1877); *U. S. v. Bowen*, 4 Cranch C. C. 604 (1835); *State v. Coleman*, 27 La. Ann. 691 (1873); *State v. Trivas*, 33 Id. 1096; 36 Am. Rep. 298 (1890).

² *R. v. Monkhouse*, 4 Cox, 55.

times so apparent as to leave no doubt of the intention. A man could not put a pistol while he knew it to be loaded, to another's head and fire it off without intending to kill him; but even then the state of mind of the party is most natural to be considered. For instance, if such an act will be done by a born idiot, the intent to kill could not be inferred from the act. So if the defendant is proved to have been intoxicated, the question becomes a more subtle one; but it is of the same kind, namely, was he rendered by intoxication entirely incapable of forming the intent charged? The case cited is one of great authority from the eminence of the judge who decided it. The only difficulty is in knowing whether we get the exact words of the judge from the case quoted, and even if we do whether all the facts are stated which induce him to lay down the particular rule. Although I agree with the substance of what my brother Patteson is reported to have said,¹ I am not so clear as to the propriety of adopting the very words. If he said that the jury could not find the intent without being satisfied it existed, I shall so lay it down to you; the only difference between us is as to the amount and nature of the proof sufficient to justify you in coming to such a conclusion. Under such circumstances as these when the act is unambiguous, if the defendant was sober, I should have no difficulty in directing you that he had the intent to take away life, when if death had ensued the crime would have been murder. Drunkenness is ordinarily neither a defense nor excuse for crime and where it is available as a partial answer to a charge it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent him from restraining himself from committing the action in question, or to take away from him the power of forming any specific intention. Such a state of drunkenness may no doubt exist."

¹ R. v. Cruise, 8 O. & P. 546.

RULE 68. — A person is presumed to intend to do what is within his right and power rather than what is beyond them.

Illustrations.

I. A., B. & C. were the devisees of an estate for life to become one in fee; on the death of D. they made a division of the estate. The question was whether they had divided the life estate or the estate in fee. *Held*, that the presumption was the former.¹

II. A lease of dwelling houses contains a covenant on the part of the lessee that he will not, without the consent of the lessor, carry on any trade in any house. He afterwards converts one of them into a public house and grocery, and the lessor, with knowledge of it, receives the rent for more than twenty years. The presumption is that the lessor has licensed this use.²

III. An action is brought on a contract for goods sold. The goods are proved to be liquors. The presumption is that the plaintiff was duly licensed to sell them.³

IV. A person makes a deed of land. The presumption is that he was seized of the land at the time.⁴

V. R. gives to L. an order on J., his debtor, for a sum less than the debt; he also gives to F. an order on J. for the whole sum due from J. to R. F.'s order being lost, the question is which was given first. The presumption is that the order in favor of L. was.⁵

VI. It is alleged that certain goods were sold contrary to law. The burden of proving that the sale was in violation of law is on the party alleging it.⁶

VII. A statute allows ten per cent interest to be reserved only in the case of money loaned. A contract provides for the payment of ten per cent interest without showing the consideration. The presumption is that it was money loaned.⁷

VIII. The question is whether A. has committed a certain act. The doing of the act renders A. liable to a penalty. That A. has done an act involving a penalty will not be presumed.⁸

¹ Pool v. Morris, 29 Ga. 335 (1859).

² Gibson v. Doeg, 2 H. & N. 615 (1857).

³ Horan v. Weiler, 41 Pa. St. 470 (1862).

⁴ Bolster v. Cushman, 34 Me. 428 (1853).

⁵ James River, etc., Co. v. Littlejohn, 18 Gratt. 53 (1867); Littlejohn v. Ferguson, *Id.*

⁶ Trott v. Irish, 1 Allen, 481 (1861); Hewes v. Platts, 12 Gray, 143 (1858); Stebbins v. Leowolf, 1 Cush. 137 (1849); Kidder v. Norris, 18 N. H. 533 (1847).

⁷ Sutphen v. Cushman, 35 Ill. 187 (1864).

⁸ Sidney v. Sidney, 3 P. Wms. 270 (1734); Clark v. Perriam, 3 P. Wms. 834 (1741); Scholes v. Hilton, 10 M. & W. 15 (1842).

IX. A. sues B. for his services as B.'s bar-keeper. There is no proof whether B. is a legal seller of liquor, *i.e.*, has a license. The presumption is that he has.¹

X. A. is sued for destroying certain dwelling houses. In mitigation of damages he offers to prove that the houses were houses of ill-fame and could not have been rented for any other purpose—honest people would not live in them. The evidence is inadmissible; for the law can not presume that future tenants will violate the law.²

XI. In an action by A. against B., A. alleged that B., who had chartered his ship, had put on board a dangerous commodity by which a loss happened, *without due notice to the captain*, or any other person employed in the navigation; the burden of proving that B. did not give the notice was on A.³

XII. A railroad company is authorized to construct a railroad in a public street, with necessary switches and turn-outs; it makes certain switches, which it is alleged are a nuisance. The presumption is that they are necessary, and the burden is on the one complaining of the nuisance.⁴

“It is a natural presumption,” it was said in case I., “that men intend to do that which they have a right and power to do rather than what is beyond their right or power. * * * The division was of course meant to be a complete one of whatever was divided unless the contrary appears. The life estate could have been completely divided at that time, nothing else being necessary to render it perfect, but the remainder could not have been so divided at that time, for that division could not have been completed till the death of D. * * * This presumption must prevail until rebutted by affirmative contrary evidence.”

“It is a maxim of the law of England,” it was said in case II. “to give effect to everything which appears to have been established for a considerable length of time, and to presume that what has been done was done of right and not in wrong. That practically has caused a series of trespasses to constitute a right so that it may be said, a right

¹ *Timson v. Moulton*, 3 Cush. 269 (1849).

² *Johnson v. Farwell*, 7 Me. 379 (1831).

³ *Williams v. East India Co.*, 3 East, 104 (1803).

⁴ *Carson v. Central R. Co.*, 35 Cal. 326 (1898).

has grown out of proceedings which are wrongful. But in truth it is nothing more than giving effect to notorious and avowed acquiescence. No person would have permitted a covenant to be broken for more than twenty years, unless he was aware that it was broken as a matter of right. It is not necessary in point of form to send the case to a jury to find the facts which the judge may tell them they ought to presume."

In case V. it was said: "In the absence of any evidence on the subject the presumption must be that L.'s order was given first. For it would have been an act of folly as well as a fraud in R. to give L. an order for the amount of his debt when he had already given F. an order for the whole balance due him from the company. The court will not presume this, in the absence of all evidence, but will presume the contrary."

It was argued in case XII., that to compel A. to prove the want of notice was compelling him to prove a negative which in a civil action at least was against the general rules of evidence. But Lord Ellenborough said: "That the declaration in imputing to the defendants the having wrongfully put on board a ship without notice to those concerned in the management of the ship, an article of a highly dangerous, combustible nature, imputes to the defendants a criminal negligence, can not well be questioned. In order to make the putting on board wrongful the defendants must be cognizant of the dangerous quality of the article put on board, and if being so, they yet gave no notice considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous article on board for which they are criminally liable and punishable as for a misdemeanor at least. We are, therefore, of opinion, upon principle and the authorities, that the burden of proving that the dangerous article in question was put on board without notice rested upon the plaintiff's alleging it to have been wrongfully put on board without notice of its nature and quality."

CHAPTER XIV.

THE PRESUMPTIONS FROM THE COURSE OF NATURE.

RULE 69. — The law presumes that in a particular case the regular course of nature applied or was followed.

Illustrations.

I. A. is charged with a crime. It is shown that A. at the time it was committed was under fourteen years of age. The presumption is that A. was incapable of committing the crime.¹

II. A crime is committed by a woman in the presence of her husband. The presumption is that it was done under his coercion.²

III. A wife commits a tort in the presence of her husband. The presumption is that she acted under coercion of the husband, and she is not liable.³

IV. A statement is proved to have been made in the presence of H. It will be presumed that H. heard it.⁴

V. A wife who lives on her own premises, and has children by a former husband, living with her, claims certain property as "head of a family." The presumption is that the husband is the "head of the family" and the wife can not recover.⁵

VI. A deed of gift of property to a married woman is proved to have been made, and the question is where is it? The presumption is that it is in the possession and custody of her husband.⁶

VII. Money is advanced by a parent to his child. The presumption is that this is done as a gift and not as a loan.⁷

¹ *R. v. Owen*, 4 C. & P. 236; *Queen v. Smith*, 1 Cox C. C. 260; *Com. v. Mead*, 10 Allen, 396; *People v. Davis*, 1 Wheeler, 230; *Walker's Case*, 5 City Hall Rec. 137; *Dove v. State*, 37 Ark. 263 (1881).

² *Com. v. Néal*, 10 Mass. 153 (1813); *R. v. Knight*, 3 C. & P. 116; *R. v. Conolly*, 3 Lewin, 239; *R. v. Price*, 3 C. & P. 19; *R. v. Archer*, 1 Moody, 143; *R. v. Matthews*, 1 Den. C. C. 549; *Freel v. State*, 21 Ark. 212 (1860). But statements made by a married woman where the boundary between her land and her husband's is, are not presumed after her decease to have been made under coercion by him. *Pike v. Hayes*, 14 N. H. 19 (1843).

³ *Marshall v. Oakes*, 51 Me. 309 (1864).

⁴ *Hochrieter v. People*, 2 Abb. App. Dec. 363 (1864); *aliter*, of course, were he unconscious from sleep or stupor. *Lanergan v. People*, 39 N. Y. 41 (1868).

⁵ *Clinton v. Kidwell*, 23 Ill. 437 (1876).

⁶ *McLain v. Winchester*, 17 Mo. 49 (1853).

⁷ *Hicks v. Keats*, 4 B. & C. 71 (1825).

VIII. A husband buys a piece of land and conveys it to his wife. Afterwards he makes improvements on it at his own expense. This will be presumed to be a gift to the wife.¹

IX. A husband and wife are living together. The wife purchases certain articles for the house. The presumption is that this was done by his direction.²

X. In a civil or criminal case, as it may be, the question arises whether a party or a prisoner or a witness, or any person in fact, is sane. The presumption is that he is sane, and the burden of proof is on the party alleging insanity.³

In case I. Littledale, J., said to the jury: "The prisoner is only ten years of age, and unless you are satisfied by the evidence that in committing this offense she knew she was doing wrong, you ought to acquit her. Whenever a person committing a felony is under fourteen years of age, the presumption of law is that he or she has not sufficient capacity to know that it is wrong, and such person ought not to be convicted, unless there be evidence to satisfy the jury that the party at the time of the offense had a guilty knowledge that he or she was doing wrong." And in the case next cited Erle, J., said: "Where a child is under the age of seven years, the law presumes him incapable of committing a crime after the age of fourteen he is presumed to be responsible for his actions as entirely as if he were forty; but between the ages of seven and fourteen * * * guilty knowledge must be proved by the evidence and can not be presumed from the mere commission of the act."

¹ Ward v. Ward, 36 Ark. 566 (1880).

² Lane v. Ironmonger, 13 M. & W. 366; Pickering v. Pickering, 6 N. H. 124; Stall v. Meek, 70 Pa. St. 181; Felker v. Emerson, 16 Vt. 653; Phillipson v. Hayter, L. R. 6 C. P. 38; Morgan v. Obetwynd, 4 F. & F. 451; Freestone v. Butcher, 9 C. & P. 647.

³ U. S. v. Lawrence, 4 Oranch C. C. 514 (1835); U. S. v. McGhee, 1 Curt. 1 (1851); Burton v. Scott, 3 Rand. 339 (1825); Thornton v. Appleton, 29 Me. 200 (1849); Cordrey v. Cordrey, 1 Houst. (Del.) 269 (1855); Stubbs v. Houston, 33 Ala. 555 (1859); Lilly v. Waggoner, 27 Ill. 335 (1862); State v. Pike, 49 N. H. 399 (1870). In will contests in Massachusetts there is said to be no presumption of the sanity of a testator, but the person offering the will for probate must prove it. Crowninshield v. Crowninshield, 2 Gray, 524 (1854); Breed v. Pratt, 38 Pick. 115 (1866); Phelps v. Hartwell, 1 Mass. 71 (1804); Blaney v. Sergeant, 1 Mass. 335 (1805). Where the attesting witnesses to a deed are dead there is no presumption that if living they would testify that the grantor was of sane mind at the time of the delivery of the deed. Flanders v. Davis, 19 N. H. 129 (1848).

In *R. v. Smith*,¹ a boy of ten years of age was indicted for setting fire to a hay rick. There was no evidence of any malicious intention. Early, J. (to the jury): "Where the child is under the age of seven years, the law presumes him to be incapable of committing a crime; after the age of fourteen, he is presumed to be responsible for his actions as entirely as if he were forty, but between the age of seven and fourteen, no presumption of law arises at all and that which is termed a malicious intent — a guilty knowledge that he was doing wrong — must be proved by the evidence, and can not be presumed from the mere commission of the act. You are to determine from a review of the evidence whether it is satisfactorily proved that at the time he fired the rick (if you should be of opinion he did fire it) he had a guilty knowledge that he was committing a crime." The prisoner was acquitted.

In *Walker's Case*² the prisoner, a boy, was indicted for petty larceny in stealing ten pounds of copper bolts. It appeared that after stealing them he had carried them to a store and sold them. The mother of the boy, being sworn in his favor, testified that he was but a few weeks more than seven years of age, and that in consequence of falling on his head his senses were impaired. No evidence was offered on the part of the prosecution to show his capacity. The court charged the jury that as a child of seven was held incapable of crime, and between that age and fourteen it was necessary to show his capacity, and that in proportion as he approached to seven the inference in his favor was the greater, and as he approached to fourteen the less, there was not sufficient evidence in the case to support the prosecution, especially as strong evidence of incapacity had been produced on his part.

In *People v. Townsend*³ a number of defendants were indicted for permitting a nuisance on their lands. On appeal Bronson, J., said: "Although one object of the prosecution may be the abatement of the nuisance there may

¹ 1 Cox, 260 (1845).

² 5 City Hall Rec. 167.

³ 3 Hill, 481 (1842).

also be a judgment of fine and imprisonment against the defendants. They must, therefore, be tried on the same principles which would govern if they were charged with any other misdemeanor. The case does not state the ages of the infant defendants, but if, as was suggested in the argument, some of them are only a year or two old, they are not *doli capax*, and could not rightfully be convicted of any offense."

In *Commonwealth v. Mead*,¹ the defendant, Mary Mead, was indicted for selling intoxicating liquors. It was proved at the trial that she was a daughter of Eliza Mead, and at the time of said sales was under twelve years of age, living with her parents, and that the sales were made by her in the dwelling house of her parents, and under and by direction of her mother, to whom the liquors belonged. The defendant also put in evidence a license granted to her mother to sell liquors under the internal revenue acts of the United States. The defendant requested the court to instruct the jury that if she, at the time of making the sales, was under twelve years of age, and if the sales were made under the general direction of the mother, in the dwelling house of the parents of the defendant, then she could not be convicted under this indictment. The judge declined so to rule, and instructed the jury that the license was no defense, if the sales were made in violation of the statutes of Massachusetts; and that if the defendant did, in the dwelling house of her parents, and while she lived with them, and by direction of her mother, and while under twelve years of age, make three or more separate sales of the liquor they should find for guilty. This instruction on appeal was reversed, Bigelow, C. J., saying: "The question of the legal competency of the defendant to commit the offense charged in the indictment was distinctly raised in the present case by the fact proved at the trial that she was under twelve years of age. The rule of the common law is perfectly well settled, that a child between the ages

¹ 10 Allen, 398 (1865).

of seven and fourteen is not presumed to be *doli capax*, and the question whether, in committing an offense, such child in fact acted with intelligence and capacity, and an understanding of the unlawful character of the act charged, is to be determined by the jury upon the evidence, and in view of all the circumstances attending the alleged criminal transaction.¹ This rule is uniformly applied when children under fourteen and above seven years of age are charged with murder or other felonies. *A fortiori*, it is applicable where they are accused of lesser offenses, or with the commission of acts coming within the the class of *mala prohibita*. These do not so violently shock the natural moral sense or instinct of children, and would not be so readily recognized and understood by them to be wrong, or a violation of duty, as the higher crimes of murder, arson, larceny, and the like. Although the attention of the judge at the trial was drawn to the fact that the defendant was of tender years, so that no presumption of legal capacity to commit crime existed, he wholly omitted to give any instructions from which the jury could be led to infer that it was their duty to find that the defendant knew the unlawful character of the act with which she was charged, before they could render a verdict of guilty against her. For aught that we can see, the verdict was rendered without any consideration of the legal competency of the defendant to commit the offense alleged in the indictment. The case was one which seems to us to have required an explicit instruction on this point. It is true that it was not necessary to show actual knowledge by the defendant of the unlawfulness of the act, if sufficient legal capacity to commit crime was otherwise proved. If capacity is established, knowledge may be presumed. Nor is it necessary to offer direct evidence of capacity. It may be inferred from the circumstances under which the offense was committed. But, nevertheless, it is to be established as a distinct fact. We are unable to see anything in the

¹ 1 Hale P. C. 22-27; 1 Archb. Crim. Pr. 10; 1 Russ. on Crimes (7th Am. ed.), 4; Rex v. Owen, 4 C. & P. 236.

facts set out in the exceptions which tend to prove that the defendant was cognizant of the illegal character of the act which she committed. She seems to have made the illegal sale in the presence of and in obedience to the express command of her mother. This fact of itself had some tendency to show that the child did not understand that the act which she was told by her parent to commit was wrong, and, in connection with the request for instructions which was made by the defendant's counsel, required the judge to give full and explicit instructions on the subject of legal competency to commit crime. The omission of such instructions was an error, which in our judgment, renders it necessary that there should be a new trial of the case."

In *Willet v. Commonwealth*¹ the opinion of the court is as follows: "Jesse Willet, a boy about twelve years of age, was indicted in the Pendleton Circuit Court upon a charge of false swearing, and sentenced to confinement in the state prison for fifteen months. There being testimony conducing to show that the accused had made conflicting statements with reference to the same matter, when examined as a witness before the grand and petit juries of Pendleton County, his counsel asked the court to say to the jury: 'That the law presumed the prisoner incapable of the crime of false swearing if, at the time, he was under fourteen years of age.' This instruction was refused, and no instruction given presenting this view of the case to the jury. The doctrine recognized in the elementary books upon the question involved is, 'that infants are *prima facie* unacquainted with guilt, and can not be convicted, unless at the time the offense was committed, they had a guilty knowledge that they were doing wrong.' This is not even a disputable presumption when applied to an infant under seven years of age; but between seven years and fourteen the commonwealth may rebut the presumption by showing a guilty knowledge on the part of the accused. Russell

¹ 13 Bush, 280 (1877).

says that this presumption will diminish with the advance of the offender's years, and will depend upon the particular facts and circumstances of his case. 1 Russell, p. 2. This same author suggests that "the proper course is to leave the case to the jury to say whether at the time of the commission of offense such person had guilty knowledge that he was doing wrong." The test given by Lord Hale is, 'whether the accused at the time was capable of discerning between good and evil.' Taylor, in his work on Evidence, questions the philosophy of the rule laid down by Hale, for the reason that it is too indefinite, and may be applied '*either to legal responsibility or to moral guilt.*' 1 Taylor on Evidence, 190. Few infants between the ages of seven and fourteen years, with ordinary intellects, are so ignorant as not to know that to lie or steal is wrong; and, therefore, in applying the rule laid down by Lord Hale or Russell, the infant derives no benefit from the legal presumption, and instead of being favored by the law, is dealt with in the same manner as those more advanced in life. A sense of moral guilt only on the part of the infant, in the absence of a knowledge of his legal responsibility for his wrongful act, will not authorize a conviction. When the prosecution satisfies the jury that the infant, at the time he committed the offense, knew it was wrong, and was aware of his legal responsibility for the commission of the crime, the legal presumption of innocence on account of his tender years no longer exists; but in the absence of such proof, the legal presumption must produce an acquittal. The court below having erred in refusing to instruct the jury on this branch of the case, the judgment is reversed and cause remanded, with directions to award a new trial, and for further proceedings consistent with this opinion."

In *State v. Sam*,¹ the opinion of the court was as follows: "The question brought up in this case for review is whether a person of color under fourteen years of age,

¹ Winst. 300, (1864).

can be convicted of an assault with intent to commit a rape. By the provisions of the Rev. Code, ch. 107, § 44, and ch. 34, § 2, the offense charged in the bill of indictment is declared to be a capital felony, and is, therefore, entitled to be considered under the safeguards which the law has thought proper to throw around human life. By the common law persons between the ages of seven and fourteen may be convicted of most offenses, if, added to the proof of the *corpus delicti*, there be proof also of the mischievous mind. There is a legal presumption that such persons are *doli incapaces*; but it is a rebuttable presumption. It is not so in respect to the crime of rape. The presumption against its commission by persons below the age of puberty (fourteen) is irrebuttable. This is not so much on the ground of incapacity of mind or will, but of physical impotency. It will follow as a plain legal deduction from this, that the person under fourteen can not commit an assault with intent to commit a rape. It is a logical solecism to say, that a person can intend to do what he is physically impotent to do. These principles are supported by the following authorities: Arch. Crim. Pr. 3; 3 Chitty's Crim. Law, 811; *Rex v. Eldershaw*,¹ and *Regina v. Phillips*.² The courts of two of the States north of us have held convictions for 'assaults with intent' right, when the persons were under fourteen. But it is noticeable that the offense in these States is a misdemeanor. In the one case there was a divided court, and in the other the common-law principles, as here laid down, were recognized; but the court undertook to alter them, to suit the altered temperament of the population. These do not at all affect the stability of the law as now expounded. With the exceptions noticed, it has been uniform, we think, in all the settlements of the continent which have adopted the common law of England. By a proper consideration of principles,

¹ 14 Eng. Com. Law, 336.

² 34 Eng. Com. Law, 763.

it will be seen why the fact found by the jury that there was an emission of seed from the person of the prisoner, does not materially affect the case. The presumption which arises from want of age, applies equally to the offense of rape and the offense of assault with intent to commit it. Both presumptions are irrebuttable. The case of *State v. Pugh*,¹ recognizes the distinction here made. So far from impugnig it is strictly in accordance with them. A large portion of our population is of races from more Southern latitudes than that from which our common law comes. We have, indeed, an element of great importance from the torrid zone of Africa. It is unquestionable that climate, food, clothing, and the like, have a great influence in hastening physical development. Whether it may not be advisable to move down to an earlier age than fourteen, the period of puberty, for a portion, if not for all the elements in our population, may be a proper inquiry for the statesman. The courts decide the law as it stands. The legislative body will inquire whether the exigencies of the age require change.

In *R. v. Smith*,² the wife acting, as the jury found, under the coercion of her husband wrote letters to the prosecutor pretending that she had become a widow and requesting a meeting at a distant place. The meeting was granted, and the wife, dressed as a widow, met the prosecutor at a railway station, and induced him to go with her to a lonely spot, where the husband fell upon him and inflicted the injuries alleged in the indictment. A verdict of guilty of felonious wounding was entered against both husband and wife, the former was sentenced but the judge reserved the question of the wife's liability for the full court. It was afterwards considered by Pollock, C. B., Willis, J., Bramwell, B., Channell, B., and Byles, J., who reversed her conviction, Pollock, C. B., saying: "The jury have dis-

¹ 7 Jones, 61.

² Dears. & B. 553 (1858).

posed of this case by their finding. They have found that Sarah Smith was a married woman; that she acted under the coercion of her husband and that she herself did not inflict any violence upon the prosecutor. The conviction, therefore, so far as it extends to her, must be reversed."

In *R. v. Hughes*¹ Thompson, J., said: "The law, out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption *prima facie* * * * that it was done under his coercion."

In *R. v. Connolly*,² the prisoner, Sarah Connolly, was indicted for uttering base coin. The evidence was that she had gone from house to house uttering base coin, and that her husband accompanied her to the door but did not go in. Bayley, J., directed the jury to infer that she was acting under the coercion of her husband and to find her not guilty.

In *R. v. Archer*³ the prisoner and his wife were indicted for burglary and receiving stolen goods. The judge told the jury that generally speaking, the law does not impute to the wife those offenses which she might be supposed to have concurred in by the coercion or influence of her husband and particularly where his house is made the receptacle of stolen goods; but if the wife appears to have taken an active and independent part and to have endeavored to conceal the stolen goods more effectually than her husband could have done, and by her own acts, she would be responsible as for her own uncontrolled offense. On appeal all the judges held that as the charge against the husband and wife was joint, and it had not been left to the jury to say whether she received the goods in the absence of the husband, the conviction of the wife could not be supported, though she had been more active than the husband, and they recommended a pardon for her.

In *R. v. Stapleton*,⁴ S. and his wife were indicted for a robbery, in which the latter appeared to have taken an active

¹ 2 Lewin, 230 (1820).

² 2 Lewin, 229 (1829).

³ 1 Moody, 145 (1826).

⁴ 1 Cr. & D. 163 (1828).

part. Bushe, C. J., left the question of coercion to the jury, who found both prisoners guilty. The point was reserved for the consideration of the judges, who held that the presence of the husband afforded only presumptive evidence of coercion of the wife, which was capable of being repelled by other evidence. Some of the judges doubted whether the privilege of a *feme covert* existed in any case attended with violence to the person. The conviction was sustained.

In *Queen v. Buncombe*,¹ Mary Buncombe was indicted for assaulting and robbing one Boley. Marshman, in opening the case for the prosecution stated that it appeared that the offense was committed by the prisoner in the presence of her husband, who had absconded. Coleridge, J., "Can you proceed with this case? If the offense was committed in the presence of her husband, how can she be liable?" Marshman contended that the wife was liable for an offense committed in the presence of her husband where violence is used; citing the following passage from Russell on Crimes,² in reference to *femes covert*: "And if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treason, murder, or robbery in company with or by coercion of her husband, she is punishable as if she were *sole*." Coleridge, J.: "On such an authority the case must proceed. But if the prisoner be convicted I shall reserve the point for the consideration of the judges." The prisoner, however, was found not guilty.

In *R. v. Wright*,³ it was ruled that where a larceny is jointly committed by a husband and wife, the wife is entitled to be acquitted as under coercion, and that the woman, being indicted as the wife of A. B. (the male prisoner) is sufficient proof that she is so for this purpose. In this case Henry Knight and Anne his wife were indicted for stealing curtain pins. From the evidence it appeared that

¹ 1 Cox C. C. 183 (1845).

² Vol. 1, p. 12.

³ 1 C. & P. 116 (1822).

both the prisoners were in company at the time of the theft. Park, J., directed the jury to acquit the female prisoner, because if a man and his wife jointly commit a felony, the wife, being presumed in law under his coercion and control, is entitled to an acquittal. It was not necessary in this case to adduce evidence to show she was his wife, as it was admitted on the face of the indictment, the prisoners being indicted as "Henry Knight and Anne his wife." "Another strong case is that of Elizabeth Ryan, better known by the name of Paddy Brown's wife, who was tried at the Old Bailey under the statute of 16 Geo. II., ch. 31, for conveying implements of escape to her husband who was in Newgate, convicted of felony. It appeared that she procured the instruments in question by her husband's direction. She was convicted, but afterwards pardoned, it was understood because the judges considered that she acted under coercion, though her husband, from being in prison could not be present."¹

In a note to *R. v. Knight*,² it is said: "In all cases except treason and murder where a felony is committed by a husband and wife jointly, or by a wife in company with her husband, the wife being presumed in law under his control, is entitled to an acquittal. A strong case on this subject occurred in the Midland Circuit before Mr. Justice Burrough. A husband and wife were jointly indicted for a robbery; it appeared that the husband was reluctant, but his wife compelled him to go with her and commit the robbery; the learned judge directed the jury to acquit the woman on the ground of coercion, saying that it was a presumption of law which he and they were bound by; however in fact the coercion might be the contrary way. The woman was acquitted and the man found guilty." The later cases, it is obvious, do not go so far as this in exculpating the wife.

In *R. v. Squire*,³ tried at the Stafford Lent Assizes, A. D.

¹ Note to *R. v. Knight*, 1 C. & P. 116 (1823).

² 1 C. & P. 116 (1823).

³ *Burns, Justice, tit. Wife.*

1790, Charles Squire and Hannah his wife were indicted for the murder of a boy who was bound as a parish apprentice to the prisoner Charles; and it appeared in evidence that both the prisoners had used the apprentice in a most cruel and barbarous manner, and that the wife had occasionally committed the cruelties in the absence of her husband. But the surgeon who opened the body deposed that in his judgment the boy died from debility and want of proper food and nourishment, and not from the wound, which he had received. Upon this Lawrence, J., directed the jury "that as the wife was the servant of the husband, it was not her duty to provide the apprentice with sufficient food and nourishment, and that she was not guilty of any breach of duty in neglecting to do so; though if the husband had allowed sufficient food for the apprentice, and she had wilfully withholden it from him, then she would have been guilty; but that here the fact was otherwise, and, therefore, although *in foro conscientiæ* the wife was equally guilty with her husband, yet in point of law, she could not be said to be guilty of not providing the apprentice with sufficient food and nourishment."

In *Commonwealth v. Burk*,¹ a married woman was indicted for selling intoxicating liquors, and it appeared that the sales were made in a dwelling house, her husband being at the time either within or just outside the house. The prisoner asked the judge to instruct the jury "if they found that the husband was near enough for the wife to act under his immediate influence and control, though not in the same room—the wife was not liable for such sale." But the judge instructed them that "if the husband was actually present at the time of the sale, the wife would be presumed to act under his coercion, and could not be found guilty, and that if the wife sold the liquor as the agent and by the authority of her husband, and as such received the money, the jury would be authorized in finding her guilty." Being con-

¹ 11 Gray, 437 (1858); Com. v. Welch, 97 Mass. 594 (1867).

victed she appealed to the Supreme Court where the ruling was held erroneous. "The instruction prayed by the defendant," said Thomas, J., "should, we think, have been given. If the wife acts in the absence of the husband there is no presumption that she acts under his coercion.¹ But if the husband was near enough for the wife to act under his immediate influence and control, though not in the same room, he was not absent within the meaning of the law. The wife, acting in the presence of the husband, and under his immediate influence and control, is not an agent within the meaning of the statute of 1855.² The law regards her as not in the exercise of her own discretion and will, and therefore is incapable of committing an offense. How far the usages of society or the new relations of husband and wife may have qualified or reversed the presumption of the common law, is for the Legislature, not the court to consider."

In *People v. Townsend*,³ several owners of property were indicted for a nuisance. On appeal Bronson, J., said: "Nor do I see on what principle the *femes covert* were included in the indictment. During coverture the husband has the control of the wife's estate, and if he erects a nuisance on her land she can not be made to answer criminally for that offense."

In *Commonwealth v. Lewis*, it was said: "The humanity of the criminal law does indeed in some instances consider the acts of the wife as venial, although she has in fact participated with her husband in certain acts which on the part of the husband would constitute an offense as against him; upon the ground that much consideration is due to the great principle of confidence which a *feme covert* may properly place in her husband, as well as the duty of obedience to the commands of the husband by which some *femes covert*s may be reasonably supposed to be influenced in such cases. Thus in cases of theft or burglary, where the wife is

¹ *Com. v. Murphy*, 3 Gray, 511.

² 3 Hill, 481 (1842).

³ Ch. 215, sec. 15.

in company with her husband, the law presumes that she acts under coercion, and she is to be acquitted.”¹

In *State v. Williams*,² the husband of the *feme* defendant was jointly indicted with her for an assault and battery upon one Anna Davis. It was in evidence that the defendant and her husband committed a battery on the prosecutrix. The defendant’s counsel asked the court to instruct the jury that the *feme* defendant was not guilty, as the offense had been committed with her husband, and in his presence. The court denied so to charge, but instructed the jury that when a married woman, in the presence of her husband, committed an offense against natural law, and with force and violence, the presumption of coercion did not arise. Defendant excepted; verdict of guilty; judgment and appeal. In the Superior Court the verdict was set aside, Rodman, J. saying: “The liability of a wife for a crime committed in the presence of her husband, has been variously stated by respectable text writers. Blackstone” says: ‘And in some felonies, and some inferior offenses committed by her (the wife) through constraint of her husband, the law excuses her; but this extends not to treason or murder.’ The same writer in Book IV. says: ‘And she will be guilty in the same manner, of all those crimes which like murder are *mala in se*, and prohibited by the law of nature.’⁴ Also, in Archibold’s *Crim. Prac. and Pleading*: ‘So if a wife commit an offense under felony, and in company with her husband, she is liable to punishment as if she were not married.’ For this is cited, 1 Hawk. ch.; sec. 13: ‘And generally a *feme covert* shall answer as much as if she were sole, for any offense, not capital, against the common law or statute. And if it be of a nature that may be committed by her alone without the concurrence of her husband,’ etc. It was upon a recollection of these authorities that his Honor below ruled in the case as he did. Never-

¹ Com. v. Lewis, 1 Metc. 153 (1840).
² 65 N. C. 365 (1871).

³ Book 1, p. 444.
⁴ 1 Russ. Cr. 16.

theless upon a fuller examination of the authorities, we are of the opinion that he was in error. It seems to be admitted by all the authorities, that if a wife commit any felony (with certain exceptions not material now to consider), in the presence of her husband, it shall be presumed, in the absence of evidence to the contrary, that she did it under constraint by him, and she is therefore excused. It is generally agreed that treason and murder are exceptions to this rule; and some add to these manslaughter, robbery, and perjury, although the last is not a felony. The most important (perhaps all) of the authorities will be found referred to in the notes to *Commonwealth v. Neal*,¹ in the argument of the counsel for the prisoner in *Regina v. Cruse*.² As has been seen, several eminent text writers confine the presumption to cases of felony. But the more recent cases, both English and American, extend it to misdemeanors as well; those cases excepted, which from their nature would seem more likely to be committed by women, such as keeping a bawdy house, etc. The case above referred to, of *Commonwealth v. Neal*,³ was an indictment against husband and wife for an assault and battery, and is therefore in point. Bishop⁴ considers the rule applicable to all offenses whatever, with certain exceptions, such as treason, murder, etc. There are many English cases in which it has been applied in indictments for receiving stolen goods.⁵ *Rex v. Price*⁶ was for a misdemeanor in uttering counterfeit coin; and as was *Connolly's Case*.⁷ When our accustomed authorities differ as to a principle, it is always proper to look at its foundation in reason. Mr. Lewin in his note to *Rex v. Hughes*,⁸ says, that the reason

¹ 10 Mass. 152; 1 Lead. Crim. Cases, 81.

² 2 Moody C. C. 53, and in 1 Bishop C. Law, 452.

³ 10 Mass. 152.

⁴ 1 vol., sec. 452.

⁵ *Rex v. Archer*, 1 Moody C. C. 143; *Regina v. Barber*, 4 Cox C. C. 272.

⁶ 8 C. & P. 12.

⁷ 1 Lewin C. C. 227.

⁸ 2 Lewin C. C. 225.

of the rule in cases of burglary and larceny, had been said to be, that the wife might not know whose the goods were that were taken. This reason he properly rejects as insufficient and suggests that it was considered odious and unjust to inflict on the wife a severe punishment when the husband could plead his clergy (which a woman could in no case do), and thus escape with a slight one. The reason would confine the principle to the clergyable felonies. It seems, however, more natural to suppose the principle to have been founded upon the fact, that in most cases the husband has actually an influence and authority over the wife, which the law sanctions, or at least recognizes.¹ In that case the reason would apply to a misdemeanor with at least as much force as to clergyable fitness, and this, we think the true view. It is also conceded by all the authorities that the presumption may be rebutted by the circumstances appearing in evidence, and showing that in fact, the wife acted without restraint; or by the nature of the offense. But in this case no circumstances appear tending to rebut the presumption which the law raises; and the case was not put to the jury in that point of view."

In *Commonwealth v. Egan*,² on the trial the evidence showed that while the defendant's husband and son were using angry words towards Saxton, the defendant, in the immediate presence of her husband, threw a pail of dirty water on Saxton. This was all the material evidence in the case. Upon these facts, the defendant asked the judge to instruct the jury that the presumption was that she acted under the coercion and control of her husband, and should be acquitted, but the judge declined, and instructed the jury that if they were satisfied that she did the acts proved of her own free will, free from the coercion or influence of her husband, they would be warranted in convicting her. The defendant was found guilty and moved in arrest of

¹ 1 Hawk., ch. 1, sec. 9; 1 Bishop C. L. 452.

² 103 Mass. 71 (1867).

judgment, "because it does not appear in the body of the complaint who was the complainant, and that such defect is apparent, and is in matter of substance and not of form." The motion was overruled, and the defendant alleged exceptions, which were sustained in the Supreme Court. Morton, J., saying: "The assault of which the defendant was convicted was committed in the immediate presence of her husband. The presumption of law is, that she acted under his coercion.¹ It was the right of the defendant to have this principle stated to the jury. The counsel asked the court to instruct the jury 'that the presumption was that she acted under the coercion and control of her husband, and should be acquitted.' If there was evidence in the case to rebut the presumption in favor of the defendant, the court was justified in refusing to instruct the jury that she should be acquitted; but we think that the first part of the instruction requested should have been given. The instructions actually given would have been accurate if the court had also instructed the jury as to the presumption above stated, but by the refusal to do so the defendant was deprived of the benefit of this presumption as one of the elements proper for the consideration of the jury in determining her criminal liability.

It is held in Arkansas that under the statute of that State if a married woman commits a crime of any kind or degree under the threats, commands, or by the coercion of her husband, she can not be found guilty, but the coercion is not to be presumed from his presence, but must be proved by circumstances. In *Freel v. State*,² Sally Freel was indicted for and convicted of aiding and abetting her husband in the murder of one Ortner. On appeal the Supreme Court said: "The plaintiff in error moved the court to instruct the jury as follows: 'If the jury believe from the evidence that the act charged in the indictment was committed by the defendant Sally Freel, in the presence of the defendant James M.

¹ Commonwealth v. Gannon, 97 Mass. 547; Commonwealth v. Burk, 11 Gray, 457.

² 21 Ark. 212 (1860).

Freel, and the said James M. Freel is and was her husband at the time of its commission they must find the defendant Sally Freel, not guilty under the indictment.' Which the court refused; and the plaintiff in error then moved the court to instruct the jury as follows: 'That if they believed from the evidence that she was the wife of the said defendant James M. Freel, and the said act charged in the indictment was done or committed by the defendant Sally Freel, in the presence of the said defendant James M. Freel, the presumption of law is that the said act was done and committed by her under and on account of the coercion of the said defendant James M. Freel, and that this presumption continues until it is rebutted by evidence on the part of the State showing that she did not so act under such coercion.' Which the court refused; and of its own motion instructed the jury as follows: 'That under the indictment herein, they can find the defendant guilty of murder in the first degree, or murder in the second degree, or manslaughter. That the fact that the offense charged in the indictment was committed by the defendant in the presence of the said defendant James M. Freel, the husband of the defendant, affords her no legal excuse or justification for its commission.' Marriage does not deprive the wife of the legal capacity of committing crime. Where she voluntarily commits crime of any grade, the mere presence of her husband does not excuse her. It is said in some of the English books, that if she commit treason, murder, or robbery, by the coercion of her husband, the law, on account of the odiousness and dangerous consequences of these crimes, will not excuse her.¹ Mr. Bishop thinks the better opinion is that the coercion of the husband will exempt her from criminal liability for any offense whatever.² It is agreed by the authorities, that, by the common law, the coercion of the husband is not to be presumed from his presence in cases of treason,

¹ Arch. Crim. Plea. & Ev. 6; Roscoe Cr. Ev. 256; Hale P. C. 44.

² Bishop Cr. L., sec. 277; but see Wharton, 53.

murder, and robbery, though as to other felonies and misdemeanors, perhaps, the rule is otherwise.¹ Our statute declares that: ‘Married women acting under the threats, commands, or coercion of their husbands, shall not be guilty of any crime or misdemeanor, if it appears from all the facts and circumstances of the case, that violence, threats, commands, or coercion were used.’² The first instruction moved by the plaintiff in error was properly refused by the court, because it assumes the law to be, in effect, that the wife can not commit a crime in the presence of her husband — or at least that his presence exempts her from criminal liability. The second was also properly refused, because it assumes that the coercion of the husband is to be presumed from his presence, in a case of murder (the instruction does not discriminate between offenses), which is contrary to the common-law rule and not warranted by our statute. The charge given by the court, of its own motion, to the effect that the presence of the husband was no legal excuse or justification for the commission of the offense by the wife, was substantially correct. If the common-law rule was that the coercion of the husband was no excuse for the wife in treason, murder, and robbery, as stated by the English authors above cited (but controverted by Mr. Bishop), then the effect of our statute was to extend the rule, and make the coercion of the husband an excuse for the wife in ‘any crime or misdemeanor;’ but there is nothing in the statute from which it may be inferred that the Legislature meant to extend the rule further, and make the presence of the husband raise the presumption of compulsion in all cases; on the contrary, the excuse of the wife is made to depend, by the terms of the statute, upon its appearing, ‘from all the facts and circumstances of the case,’ that coercion was used.”

In case III. it was said: “The general rule of the common law is that the husband is liable for the torts of his

¹ *Id.*, and note to Hale 46, Stokes & Ing. Ed.

² Dig. Ch. 51, sec. 1 of Part I.

wife.¹ But the question here is as to their joint liability. When the tort or crime is committed by the wife alone, and without the presence, or direction of her husband, she may be held liable, civilly and criminally. In such cases, the civil action must be against both the husband and the wife.² But if committed in his presence and by his direction, he alone is liable.³ The *prima facie* presumption is, that the wife acted under coercion, if the husband was actually present. This presumption arises as well in civil suits for torts, as in criminal cases.⁴ If nothing appears but the fact that the wrong was done whilst they were both together, the jury should be instructed to acquit the wife. Such presumption is but *prima facie*, and may be rebutted by the facts proved, showing that the wife was the instigator or more active party, or that the husband, although present, was incapable of coercion, — or that the wife was the stronger of the two.⁵ The coercion must be at the time of the act done, and then the law out of tenderness refers it, *prima facie*, to the coercion of the husband.⁶ The presumption is one of the compensations, or offsets, which the old common law gave for the benefit and protection of the wife, for its stern and unyielding doctrines in relation to the superior marital rights of the husband, by which the rights, — the personal property and legal existence of the wife, — are nearly all lost or merged in her baron or lord. As was forcibly said by Mr. Chief Justice Emery, in *State v. Burlingame*,⁷ ‘the whole theory of the common law is a slavish one compared even with the civil law. The merging of the wife’s name in that of her husband is emblematic of the fate of all her legal rights. The torch of Hymen serves but to light the pile on which those rights are offered up.’

¹ *Hawks v. Hamar*, 5 Binn. 48.

² 2 Kent’s Com. 149; *Head v. Briscoe*, 5 C. & P. 484 (24 E. C. L. 419); *Keyworth v. Hill*, 3 B. & Ald. 685 (5 E. C. L. 422).

³ 2 Kent’s Com. 149.

⁴ *Hilliard on Torts*, ch. 42.

⁵ *Wharton’s Am. Cr. Law*, book 1, sec. 73; 1 Hale, 516.

⁶ *Id.*, sect. 74.

⁷ 15 Maine, 106.

It was a natural and logical result, as the founders of the common law clearly saw that if the husband was to be regarded as the head and sole representative of the union, the wife should have the benefit of her legal nonentity, when acting in presence of her husband, even if she apparently was not an unwilling actor. Her misdemeanors and trespasses were to be looked upon, not as arising from the promptings of her own mind and will, but as the result of the overpowering commands or coercion of him whom she had promised to obey. How carefully the fathers studied the first case in point, recorded in the history of man, (Genesis, Chap. III.), or some of the subsequently reported cases, where to common observation the woman and wife appears as the prime mover in wrong and mischief, we can not know and need not discuss. But to meet the actual facts of history and observation, the law has engrafted the qualification on the rule, before stated, viz., that the *prima facie* presumption may be overcome by the proof in the case, that, in fact, the wife was the originator, dictator, and principal offender.¹ When there are other facts established, besides the presence of the husband, as to the participation of the wife in originating and carrying on the common purpose, it is a question for the jury to determine whether or not the presumption is overcome."

In case V. it was said: "It is not necessary to the decision of this case to hold that a married woman, living with her husband, can not, under *any* circumstances, be regarded as the head of the family. The only facts relied upon to sustain the proposition that the appellee in this case was, at the time in question, the head of a family, are that the residence of the family was 'on her own premises;' that 'the property on the premises was her own sole and separate property,' and that 'she had children by her former husband residing with her.' These facts alone are surely not sufficient to show clearly that she was at the time, 'the

¹ Hilliard on Torts, ch. 42, sec. 1; Com. v. Lewis, 1 Metc. 153.

head of the family,' especially when it is said in the same statement that she was at the time residing 'with her husband.' Ordinarily, at least, when the wife lives with the husband, he must be regarded as the head of the family. If, in fact, he has not the control of the family, and is not the head thereof, such fact must be shown by proof. The inference that he is the head must be rebutted by proof, and in a penal action that proof must clearly rebut such inference. It may well be that this man and his wife were living upon her land, and that the personal property on the place was her property, and that her children constituted a part of the family, and yet the husband may have had the most complete control of the family and of all the business transacted upon the land. For aught that is here shown, he may have been a man of wealth, and may have been supporting his wife and her children in affluence. Again, it is not shown by the statement that the constable had notice that any anomalous relations existed in this family, constituting the wife the head of the family. Presumptions must not be too freely indulged in penal actions."

In case VIII. it was said: "It never was the intention of the constitution (in giving the wife a separate estate), to ignore the strong ties of domestic affection and mutual confidence which spring from the relation or to interfere with any presumptions based upon them. The whole doctrine of advancements is founded upon these and like presumptions and they extend not only to the relation of husband and wife, but also to mother and daughter, grandparents and grandchildren, even under some circumstances to father-in-law and son-in-law — indeed, to all the relations of life that imply the existence of strong affection with an obligation of a moral nature to love and protect. They are based upon the laws of our being, and amount only to this single common sense view that persons in these relations who do favors have higher and tenderer motives than any expectation of pay. This is only a claim for money advanced to buy a piece of land for the wife

and improve it. It was a good thing for a husband to do, and may be supposed to have been done from a desire to protect her against want. The law will not raise an implied promise on her part to repay it. It will be presumed to be a gift."

"The law respects the regular course of nature in every way, and consequently in all cases, in so far as the course of nature is known, all such facts as well in regard to the revolution of the seasons as to animals and vegetables; as the mating of birds and their co-operation in raising their young, the blooming time of roses and the like, are received as being in themselves entirely trustworthy, or as facts from which inferences as to the truth of other facts may be safely drawn. In questions of bastardy the time of access being proved, the known term of gestation, reckoning from the time of birth, is always received as a most satisfactory kind of presumptive evidence. So, too, in all the various questions in relation to the right of property, connected with a continuance of life, facts, so far as they are known, in regard to the probability, the expectation, and the average duration of human life, have always been in like manner admitted as evidence; or as a ground from which presumptive evidence of the existence of other facts may be fairly deduced, and there can be no doubt that the regular and known course of nature in the formation of vegetables may be as safely relied on as direct, or as presumptive evidence, as in that of animals."¹

The presumption is that children under the age of twenty-one years remain unemancipated, and that children above that age are emancipated, until the contrary appears.² So the domicil of an infant is presumed to be that of the mother.³

In a number of cases the English courts have acted on the presumption that a woman beyond a certain age, is inca-

¹ *Patterson v. McCausland*, 3 Bland. Ch. 70 (1830).

² *Fitzwilliam v. Troy*, 6 N. H. 166 (1833); *Oxford v. Rumney*, 3 N. H. 331.

³ *Sprague v. Litherberry*, 4 McLean, 443 (1846).

pable of child bearing.¹ No case can be found in the American courts in which such a presumption has been given effect to. In *List v. Rodney*,² it was laid down that in the devolution of estates, the law presumes the possibility of bearing children, even when a woman has passed the age to which the ability to do so usually continues. So in a number of English cases, the courts have refused to presume impossibility of issue on account of old age in the cases both of women³ and men.⁴ In the South, in slavery times, a person of color was presumed to be a slave.⁵

RULE 70. — A person is presumed to do what it is his interest to do, and not to act against his interest.⁶

Illustrations.

I. An estate is devised to A. The law presumes that it is beneficial to A., and that he accepts it. He may disclaim it, but to work this, a disclaimer must be proved.⁷

II. A conveyance of property is made to B. The presumption is that B. accepts it.⁸

¹ *Levy v. Hodges*, Jac. 585; *Lyddon v. Ellison*, 19 Beav. 565; *Miles v. Knight*, 19 Jur. 666; *Dodd v. Wake*, 5 DeG. & Sm. 226; *Brandon v. Woodthorpe*, 10 Beav. 463; *Brown v. Pringle*, 4 Hare, 124; *Edwards v. Tuck*, 23 Beav. 271; *Haynes v. Haynes*, 35 L. J. Ch. 303; *Davis v. Bush*, 8 Jur. 1114; *Davidson v. Kimpton*, L. R. 18 Ch. Div. 215; *Groves v. Groves*, 13 W. R. 45; *Widdow's Trusts*, L. R. 11 Eq. 406; *Millner's Estate*, R. 14 Eq. 245; *Payne v. Long*, 19 Ves. 571.

² 83 Pa. St. 483 (1877).

³ *Fraser v. Fraser*, Jac. 586; *Conduitt v. Soane*, 24 L. T. (N. S.) 656; *Jee v. Audley*, 1 Cox, 825; *Overhill's Trusts*, 17 Jur. 343; *Reynolds v. Reynolds*, 1 Dick. 874; *Croxtan v. May*, L. R. 9 Ch. Div. 388.

⁴ *Lushington v. Boldero*, 15 Beav. 1; *Trevor v. Trevor*, 3 Myl. & K. 675; *Alsop v. Bowtrell*, Cro. Jac. 511; *Lomax v. Holmdon*, 3 Str. 940, *vide* Mr. Stewart's note to *Appar's Case*, 37 N. J. Eq. 501 (1888).

⁵ *Field v. Walker*, 17 Ala. 80 (1849); *Becton v. Ferguson*, 23 Ala. 599 (1853).

⁶ *Creps v. Baird*, 3 Ohio St. 277 (1854); *Clawson v. Eichbaum*, 2 Grant's Cas. 130 (1853). A person's assent to a matter which is obviously for his benefit may be presumed, but not where it would be prejudicial to him. *Higham v. Stewart*, 38 Mich. 513 (1878).

⁷ *Towson v. Ticknell*, 3 B. & Ald. 31 (1819); *Thompson v. Leach*, 2 Salk. 618.

⁸ *Bensley v. Atwill*, 13 Cal. 231 (1859); *Lady Superior v. McNamara*, 3 Barb. Ch. 875; 49 Am. Dec. 184 (1848); *Peavey v. Tilton*, 18 N. H. 151; 45 Am. Dec. 365 (1846); *Merrills v. Swift*, 18 Conn. 207; 46 Am. Dec. 315 (1847); *Thorne v. San Francisco*, 4 Cal. 169; *Hallock v. Bush*, 2 Root (Conn.) 26; *Maynard v. Maynard*, 10 Mass. 456; *Wheelwright v. Wheelright*, 2 Mass. 447; *Read v. Robinson*, 6 W. & S. 329; *Chees v. Chess*, 1 Pa. St. 32; *Beers v. Broome*, 4 Conn. 247; *Tibballs v. Jacobs*, 31 Conn. 428; *Hedge v. Drew*, 13 Pick. 141; *Rugles v. Lawson*, 13 Johns. 285; *Jackson v. Phipps*, 13

III. A charter has been granted to certain parties. The law presumes it to have been accepted.¹

IV. A husband dies leaving a will in which he devises one-half of all his property to his wife. The wife dies seven days afterward without either waiving or accepting the provision, or claiming her dower. As the provisions of the will are more beneficial to her than her legal dower the presumption is that she accepted them.²

V. It is shown that certain arrangements were made for a person's benefit. The presumption is that the person assented to them.³

VI. A deed of assignment beneficial to creditors is executed by an insolvent. The presumption is that they assent to it.⁴

VII. An act of the Legislature was passed reciting that B. was the illegitimate child of A., changing B.'s surname to that of A. and legitimizing him. A. afterwards makes a deed to B. of some land as his child, and in the new name. The presumption is that A. procured or assented to the act of the Legislature.⁵

VIII. A widow is entitled to a dower or a child's portion in certain land. She remains in possession without electing until her right of dower is barred. The presumption is that she elected to take a child's part, this being more beneficial to her.⁶

IX. A. delivers a sum of money to B., a creditor of his. The presumption is that B. pays a debt, not that he makes a loan or gift.⁷

X. A debtor leaves a legacy to a creditor. This is presumed to be a payment of the debt, and not a gift.⁸

XI. Property is given by parent to a child. This is presumed to be an advancement, and not a gift.⁹

XII. A. hands a sum of money to B. The law will not presume that this is a loan.¹⁰

Johns, 431; *Church v. Gilman*, 15 Wend. 666; *Jackson v. Boale*, 20 Johns. 187; *Renfo v. Harrison*, 10 Mo. 411; *Mitchell v. Ryan*, 3 Ohio St. 377; *Barns v. Hatch*, 3 N. H. 304; *Guard v. Bradley*, 7 Ind. 600; *Brown v. Austin*, 35 Barb. 341; *Mallory v. Stoller*, 6 Ala. 801; *Herbert v. Herbert*, Breese, 282. But see, *Hulick v. Seovill*, 9 Ill. 159; *Bennett v. Walker*, 23 Ill. 97; *Welch v. Sackett*, 12 Wis. 243 (1860).

¹ *Newton v. Cabery*, 5 Oranch C. C. 683 (1840).

² *Merrill v. Emery*, 10 Pick. 507 (1830).

³ *Treat v. Treat*, 35 Conn. 210 (1868).

⁴ *Governor v. Campbell*, 17 Ala. 568 (1860); *Benning v. Nelson*, 23 Ala. 801 (1858).

⁵ *Thrower v. Wood*, 50 Ga. 459 (1874).

⁶ *Sewell v. Smith*, 54 Ga. 567 (1875); *Sloan v. Whittaker*, 58 Ga. 319 (1877).

⁷ *Welch v. Seaborn*, 1 Stark. 474 (1816); *Cary v. Gerrish*, 4 Esp. 9 (1801); *Aubert v. Walsh*, 4 Taunt. 493 (1812).

⁸ *Breton v. Cope*, 1 Peake, 48 (1791); *Cloud v. Clinkinbeard*, 8 B. Mon. 397; 48 Am. Dec. 397 (1848). And see *Zeigler v. Eckhart*, 6 Pa. St. 13; 47 Am. Dec. 428 (1843).

⁹ *Autry v. Autry*, 37 Ala. 618; *Mitchell v. Mitchell*, 8 Ala. 431; *Butler v. Ins. Co.* 14 Ala. 777; *Merrill v. Rhodes*, 37 Ala. 453; *Clements v. Hood*, 37 Ala. 463 (1878); *Dillman v. Cox*, 23 Ind. 440 (1864); *Stevenson v. Martin*, 11 Bash. 468 (1875).

¹⁰ *Gerding v. Walter*, 39 Mo. 426 (1860). But see *White v. Sheldon*, 4 Nev. 280 (1868).

XIII. A. sends B., to whom he is not indebted, \$5,000. The presumption is that this is a loan and not a gift.¹

XIV. In the absence of C. in a foreign country, F. sent to the wife of C. a check for \$500, which was collected by her. The presumption is that this was not a gift, but a loan to the wife on the credit of the husband.²

XV. A., upon the settlement of accounts with his father, gave the latter his note for \$425. In an action upon this note by the representatives of the father, A. produces the note canceled, but testifies that it had not been paid. There is no presumption that it had been released by the father.³

XVI. H. and D. bought certain land and executed a mortgage for the purchase money. H. subsequently paid the debt, and took an assignment of the mortgage. Another person subsequently obtains a judgment against D. The presumption is that the mortgage is not merged in the fee, as this would be against H.'s interest.⁴

XVII. A bargain in which the rights of A. are varied is made, A. not being present. The presumption is that A. did not consent to it.⁵

XVIII. A., as servant of B., sues B. for his wages. The fact that A. remained in B.'s service during the time for which the wages are claimed raises a presumption that he performed the service properly.⁶

In case I. it was said: "I think that an estate can not be forced on a man. A devise, however, being *prima facie* for the devisee's benefit, he is supposed to assent to it until he does some act to show his dissent. The law presumes that he will assent until the contrary is proved; when the contrary, however, is proved it shows that he never did assent to the devise, and consequently that the estate never was in him." "*Prima facie*," said Abbott, C. J., "every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is given." And Bayley, J., added: "The law, indeed, presumes that the estate devised will be beneficial to the devisee, and that he will accept of it until there is proof to the contrary."

¹ Richardson's Estate, 16 Phila. 241 (1879).

² Ficklin v. Carrington, 31 Gratt. 219 (1878).

³ Grey v. Grey, 47 N. Y. 553 (1872).

⁴ Duncan v. Drury, 9 Pa. St. 332; 49 Am. Dec. 565 (1848).

⁵ McNulty v. Hurd, 86 N. Y. 547 (1881).

⁶ Roberts v. Brownrigg, 9 Ala. 108 (1846).

In case XV., it was said: "It has become a maxim in the law that *nemo donare facile præsumentur*. To sustain the judgment would reverse that maxim. There is nothing left to stand upon but a gift, and that the law does not presume. Irrespective of the possession of the note, there is not a particle of evidence tending in the direction of this being a gift."

In case XVI. it was said: "A mortgage is not, of course, merged by coming into possession of the owner in fee.¹ It depends generally upon the intention of the parties to the arrangement accompanying the operation, either of assignment or payment. An intent to prevent the merger will be presumed whenever it is the interest of the party that the incumbrance should not be sunk in the inheritance.² Here the intent of the mortgagor and mortgagee was quite apparent that the security or incumbrance should be kept on foot, because the mortgagee assigned it to the recovering mortgagor. It is also clearly the interest of the mortgagor that it should not sink in the inheritance. If it should be so held an incumbrancer would get part of the proceeds of the sale in this case against equity, because at the time he procured his incumbrance the mortgage was indisputably the oldest lien; and it continued so up till the payment of the money by Hart. Why, then, should the judgment against Duncan, the other mortgagor, who had really no equity in the land, all the money having been paid by Hart, be held extinguished by Hart's payment of the money contrary to the expressed intent of the parties, merely to take that much out of his pocket in favor of one whose whole lien was subject to the lien of the mortgage? If he or anybody else had bid up the land to an amount exceeding the mortgage, then he would have got his money."

In a Missouri case a suit was brought on a bond given to the United States. There was no law authorizing an

¹ Moore v. Harrisburg Bank, 8 Watts, 123.

² Richards v. Ayers, 1 W. & S. 435.

officer of the United States to accept such a bond. It was held that the acceptance of the bond by a proper officer would nevertheless be presumed.¹ The court said: "In the multiplied transactions of the government of the United States, in both the executive and judicial departments, many cases occur in which it is deemed necessary and prudent to take bonds, though there is no statute authorizing it; * * * such bonds would stand upon the same footings as the bonds in the cases of *United States v. Tangey*;² *United States v. Bradley*;³ *Postmaster-General v. Rice*;⁴ *Postmaster-General v. Norvell*.⁵ In all these cases the acceptance of the bonds was presumed, although there was no law authorizing the officer to take them."

¹ *Barnes v. Webster*, 16 Mo. 256; 57 Am. Dec. 283 (1853).

² 5 Pet. 115.

³ 10 Pet. 343.

⁴ Gilp. 561.

⁵ Gilp. 120.

CHAPTER XV.

THE PRESUMPTION OF PAYMENT AND THE DIS- CHARGE OF OBLIGATIONS.

RULE 71.—Independently of a statute of limitations or in the absence of one, after a lapse of twenty years the law raises a presumption of the payment of bonds (A), mortgages (B), legacies (C), taxes (D), judgments (E), the due execution of a trust (F), and the performance of a covenant (G).¹

Even before the English statute of 34, William IV., which limited the time within which an action on a bond or other specialty might be brought, the courts had established the presumption that where payment of such an instrument was not demanded for twenty years, and there was no proof of payment of interest or any other circumstance to show that it was still in force, payment or release would be presumed.² This principle has since then become established by the courts both of the United States and of England, the period being fixed at twenty years.³

¹ Also the payment of debts generally is presumed from lapse of time. *McLellan v. Crofton*, 6 Me. 307 (1830); *Jefferson County v. Ferguson*, 13 Ill. 33 (1831); *Taylor v. Dagger*, 66 Ala. 444 (1890).

² *Oswald v. Leigh*, 1 T. R. 270 (1786).

³ *Central Bank v. Heydorn*, 48 N. Y. 260 (1873); *Brook v. Savage*, 31 Pa. St. 423 (1858); *Bellas v. Levan*, 4 Watts, 295 (1835); *Tilghman v. Fisher*, 9 Id. 441 (1840); *Boyce v. Lake*, 17 S. C. 431 (1833); *Goodwyn v. Baldwin*, 59 Ala. 127 (1877); *Lyon v. Adde*, 63 Barb. 89 (1873); *Jarvis v. Albro*, 67 Me. 310 (1877); *Olden v. Hubbard*, 34 N. J. (Eq.) 85 (1881); *Boon v. Pierpont*, 23 Id. (1877); *Downs v. Sooy*, Id. 55 (1877); *Ray v. Pearce*, 84 N. C. 485 (1881); *Rodman v. Hoops*, 1 Dall. 85 (1784); *Hopkirk v. Page*, 2 Brock. 20 (1823); *Ludlow v. Van Camp*, 6 N. J. Eq. 113; 11 Am. Dec. 529 (1823); and see *Levy v. Merrill*, 52 How. Pr. 360 (1876); *Pattie v. Wilson*, 25 Kas. 326 (1881); *Cowie v. Fisher*, 45 Mich. 629 (1881); *Lyon v. Odell*, 65 N. Y. 23 (1875); *Willingham v. Chick*, 14 S. C. 93 (1880). "A forbearance for the period of twenty years, when unexplained, is a fact from which payment of a sum demanded ought to be presumed. To cite cases in support of a proposition so firmly established is quite superfluous." *Hosmer, C. J.*, in *Lynde v. Dennison*, 3 Conn. 391 (1830).

"These presumptions to be drawn by the courts in the case of stale demands," says Chancellor Kent, "are founded in substantial justice and the clearest policy. If the party having knowledge of his rights will sit still and without asserting them permit persons to act, as if they did not exist, and to acquire interests and to consider themselves as owners of the property, there is no reason why the presumption should not be raised. It is, therefore, well settled that the presumption that a demand has been satisfied prevails as much in this court as it does at law."¹

"Every presumption," says the Master of the Rolls in *Pickering v. Stamford*,² "that can fairly be made, shall be made against a stale demand. It may arise from the acts of the parties, or the very forbearance to make the demand affords a presumption either that the claimant was conscious it was satisfied or intended to relinquish it."³

"The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined, until time has involved them in uncertainty and obscurity, and then ask for an inquiry. Justice can not be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them. Papers which our predecessors have carefully preserved are often thrown aside or scattered as useless by their successors. It has been truly said, that if families were compelled to preserve them they would accumulate to a burthensome extent. Hence, statutes of limitations have been enacted in all civilized communities, and in cases not within them, prescription or presumption is

¹ Chancellor Kent in *Giles v. Barmore*, 5 Johns. Ch. 245 (1821).

² 2 Ves. jr. 583 (1795).

³ And see *Reeves v. Brymer*, 6 Ves. jr. 511 (1801); *Mots v. Moreau*, 13 Moore P. O. C. 376 (1839).

called in as an indispensable auxiliary to the administration of justice. Courts of equity consider it mischievous to encourage claims founded on transactions that took place at a remote period. It therefore grants no relief after a great length of time. In a word, the most solemn muniments are presumed to exist in order to support long possession; the most solemn of human obligations lose their binding efficacy and are presumed to be discharged after a lapse of many years."¹

In *Buchanan v. Rowland*,² the early cases are reviewed by Kirkpatrick, C. J.: "What, then," says he, "is the ground of this presumption of payment, arising from length of time, to what cases does it apply, and how far is it conclusive? It is said that by the common law there was no stated or fixed time for the bringing of actions. The law was always open; satisfaction was never *presumed*. In the progress of society, however, it was soon found necessary to supply this deficiency by statute, and to compel men to prosecute their rights within a reasonable time, or to abandon them forever. Hence, we find, from the reign of Henry I., a succession of statutes, narrowing the latitude of the common law in this respect, and limiting the time in which actions might be brought, to shorter and shorter periods, until they had brought it down, in most cases, to twenty-one years only, and in many to a still shorter time. The reasons upon which these statutes are founded, Sir William Blackstone tells us, are: First, because the law will not disturb an actual possession in favor of a claim which has been suffered to lie dormant for a long and unreasonable time; *nam vigilantibus et non dormientibus subserviunt leges*; secondly, because it *presumes* that he who has, for a long time, had the undisturbed possession of either goods or lands, however wrongfully obtained at first, has either procured a lawful title or made satisfaction to the injured, otherwise he would have sooner sued; and thirdly, because

¹ *Foulk v. Brown*, 2 Watts, 216 (1824).

² 5 N. J. (L.) 721 (1890).

it judges that such limitations tend to the prevention of innumerable perjuries, the preservation of the public tranquillity, and what it values perhaps more than all, the suppression of contention and strife among men, *nam precipue interest reipublicæ ut finis sit litium*. Taking these great fundamental principles, then, thus recognized by successive statutes, as the basis of their conduct, the courts of justice build up, upon them, a system, extending beyond the letter of the statutes themselves. They were professedly founded, in part, Sir William Blackstone says, upon the presumption that lawful titles may have been acquired under possessions tortiously taken, and that satisfactions may have been made upon contracts, in their origin indisputably valid, but that the evidence thereof, after lying so long, may be destroyed by the all-devouring tooth of time. The judges only extended this principle to cases, which, though not within the letter, were yet within the reason and spirit of the law. Lord Hale, I think, is said to be the first who adventured upon this course; he was followed by Holt, and then came Lord Mansfield with a still bolder step; the judges in chancery, in the meantime, keeping equal pace, if not now going beyond the courts of law. In the case of *King v. Stevens*, one of the corporators of St. Ives,¹ Lord Mansfield said there was no direct and express limitation when a bond should be supposed to be satisfied; the general rule was, indeed, about twenty years, but it had been left to a jury upon eighteen. So, though there was no statute nor fixed rule of limitation, as to the length of time which should quiet the possessors of these offices, yet they ought not to be disturbed after a great length of time. In the *Winchelsea Cases*,² the court said they had unanimously resolved, that after twenty years undisturbed possession of a corporate franchise, they would grant no rule upon a corporator to show by what right he held. This resolution was founded, not on any express provision

¹ Burr. 4837.² Bur. 1692.

of the law, but in analogy to the rules established in other cases. By the statutes of limitation, they said, writs of *formedon* and entry into lands, were confined to twenty years; writs of errors were confined to twenty years; courts of equity did not allow the redemption of mortgages, after twenty years; bills of review had been generally disallowed after twenty years; bonds which had lain dormant should be presumed to be paid after twenty years; ejectments required proof of possession, within twenty years; and so, leaning upon these cases, they extended the doctrine, by analogy, without positive statute, to the case of a corporate franchise, then depending before them. The same ground has been taken, and the same course pursued by succeeding judges, down till this day; so that nothing can be better settled than that they do extend the principles of these statutes, by analogy only, to cases within the reason and spirit, though not within the letter of them. And upon this analogy, this presumption of payment, as appears by Lord Mansfield's reasoning, is wholly founded.

“ We have carried the limitation of actions, still further than they have done in England. We have carried it so far that I do not now recollect a single case, unless, indeed, it be the one before us, in which an action can be maintained after twenty years. After that time, latent titles to land, unaccompanied with possession, are supposed to be extinct mortgages to be redeemed, judgments to be satisfied, bonds to be paid. Our act for the limitation of actions, extends expressly to all these. Now, if in England, the writs of *formedon*, and entry into lands, and of writs of error, and actions of ejectment, created by statute, would be extended by analogy, to corporate franchises, and be made the ground of presumptive payment of bonds and mortgages, certainly it can not be going too far to say, that when our act of assembly has declared that no *scire facias* shall issue, or action of debt be maintained, upon a judgment unless within

twenty years from its date, and that, too, upon the presumption that it is already paid, I say it will certainly not be going too far, to extend this presumption by analogy, to the case of an execution upon such judgment, which has, indeed, been levied, but has lain dormant, now, for thirty years and more. But, suppose these points to be gained, that the principle of the statute is to be extended by analogy, and that the presumption of payment built upon it, is applicable to the case before us, in the same extent, and upon the same reason, as to a bond; still it is to be inquired how far that presumption is conclusive, and whether the verdict of a jury can be set aside, and a new trial granted, because they have found against it. It is said by the plaintiff, that the presumption, at most, is but evidence upon the plea of payment; that it may be strengthened or invalidated by concomitant circumstances, and that the jury, therefore, are to judge of its strength or weakness, and to pass upon it like other evidence. And though this may be a just view of it in a certain sense, yet, upon a careful examination, perhaps, we shall find it rather specious than solid, so far as it respects the present case. It is true that this presumption may be either strengthened or invalidated; nay, indeed, it may be wholly overcome by circumstances; and when such circumstances are mere matters *in pais* to be proved by witnesses, the jury must judge both of the truth of their existence and of their operation and effect upon the presumption. But still, when the length of time, wholly unaccounted for, and the presumption, therefore, stands in its full force, it is conclusive; and the conclusion to be drawn from it is a conclusion of law, to be declared by the court, always and universally the same; and though the jury must pass upon the issue of *solvit vel non*, yet the law thus to be declared to them, is the evidence by which they are to be governed; they are not by vain conjecture or imaginary reasonings to break down the rules of property, established by law, and declared by the court. In the case of *Hum-*

phreys v. Humphreys,¹ Lord Chancellor Talbot says, that after twenty years, and no interest paid during that time, a bond shall be presumed to be satisfied, unless something appears to answer for that length of time. And after a verdict at law, he granted an injunction to stay proceedings thereupon. So,² on a demurrer to a bill to redeem a mortgage, *where it appeared by the bill*, that the mortgagees had been in possession more than twenty years, the court held that the defendant need not even plead the length of time, but might demur; and that no redemption could be allowed; for that as twenty years would bar an entry or ejectment, so it should bar the right of redemption also; making the presumption, not only a bar, but a legal bar, conclusive upon a demurrer. In the case of *Searle v. Barrington*,³ the defendant had pleaded payment, and rested upon the legal presumption arising from length of time, the bond being of more than twenty years' standing. The plaintiff offered as evidence, to encounter this presumption, an indorsement upon the bond of interest paid within twenty years, but this was overruled by the court, *and a nonsuit ordered*. In the reconsideration of this case at bar, the court, indeed, held that the indorsement on the bond, of interest paid, was lawful evidence, and ought to have been submitted to the jury to determine whether it was made fairly and *bona fide*, or merely to evade the presumption; but there was no pretense that the presumption arising from length of time was not in itself a good bar, or that standing alone it was not a good ground of nonsuit, or that it ought to have been left to the jury to determine its effect. So in an anonymous case,⁴ Holt, C. J., says, if a bond be of twenty years' standing, and no demand proved thereon, or good cause shown for so long forbearance, upon *solvit ad diem*, I will intend it paid. From those cases, without going into a multitude of others, I think the conclusion irresistible,

¹ 3 P. Wms. 395.

² Same book, 398.

³ Str. 813.

⁴ 6 Mod. 22.

not only that twenty years affords a presumption of payment, but that that presumption, standing alone, is conclusive in the law, and is so to be declared by the court; and not to be left to the jury to determine its effect. It is true that Buller, in a later case in the King's Bench, seems to growl at this doctrine a little, and to express himself, as if he thought the jury the sole judges of the effect. Whether he was led into this, from having given a hasty opinion at the *nisi prius*, or from what other cause soever, if he meant to maintain that doctrine, he was in an error. It is contrary to the whole course of decision upon that subject, as well as to the very nature of the thing itself; for whatever the law presumes, it belongs to the court to declare, and not to the jury."

Illustrations.

A.

I. By statute certain bonds are given by an heir at law which are a lien on the lands descending to him. After twenty years the presumption (they not being within the limitation law) is that they are paid.¹

II. A suit is brought in 1834 on a bond made in 1800, a payment having been made on it in 1801. The presumption is that it is paid.²

In case I. it was said: " Bonds given by the heir entitled to elect under the act to direct descents are by the terms of the act of assembly made liens on the lands for the purchase of which they are given until paid; and therefore they are supposed not to be within the statute of limitations. But though not within these statutes, like mortgages, they are liable to presumptions of payment; and it is thought to be quite clear that when the circumstances are such as would induce the court to presume the payment of a mortgage, the same presumption would be made with reference to these bonds. It is, says Chancellor Kent, a

¹ *Boyd v. Harris*, 2 Md. Ch. 210 (1850).

² *Delaney v. Robinson*, 2 Whart. 503 (1837); *Denniston v. McKeen*, 2 McLean, 222 (1840); and see *Kirkpatrick v. Langphier*, 1 Cranch C. C. 85 (1803); *Lowe v. Stowell*, 4 Jones (L.), 225 (1856); *Rogers v. Bishop*, 5 Blackf. 106 (1839).

well settled rule, both at law and in equity, that a mortgage is not evidence of a subsisting debt, if the mortgagee never entered and there has been no interest paid or demanded for twenty years. These facts alone authorize and require the presumption of payment."

B.

I. A. claims certain land under a mortgage due in October, 1794, and made by B. It appears that B.'s heirs were in 1819 in possession of the land. The presumption is that the mortgage is paid.¹

In case I. it was said: "In furtherance of justice, and the more effectually to secure the rights of the parties in the investigation of questions in issue, and especially in

¹ *Howland v. Shurtleff*, 2 Metc. 26 (1840); *Jarvis v. Albro*, 67 Me. 310 (1877); *Trash v. White*, 3 Brown Ch. 291 (1791) and notes; *Christopher v. Sparks*, 2 Jac. & W. 235 (1820); *Gibson v. Fletcher*, 1 Ch. Cas. 59; *Leman v. Newnham*, 1 Ves. sr. 51 (1747); *Toplis v. Baker*, 2 Cox Ch. 118 (1789); *Jackson v. Wood*, 12 Johns. 242 (1815); *Livingston v. Livingston*, 4 Johns. Ch. 267 (1820); *Wanmaker v. Van Buskirk*, 1 Saxt. Ch. 685; 23 Am. Dec. 748 (1833). In *Tripe v. Marcy*, 39 N. H. 449, the court said, that the presumption that when the mortgagor is permitted to retain possession of the land for twenty years without interruption, the mortgage debt has been paid or had no valid existence is established on great authority, citing *Trash v. White*, 3 Brown Ch. 289; *Christopher v. Sparks*, 2 Jac. & W. 10; *Hughes v. Edmonds*, 9 Wheat. 497; *Dexter v. Arnold*, 8 Sum. 152; *Dunham v. Minard*, 4 Paige, 443; *Bacon v. McIntyre*, 8 Metc. 58; *Heyer v. Pruyn*, 4 Paige, 443; *Higginson v. Mein*, 4 Cranch, 415; *Collins v. Tenney*, 7 Johns. 279; *Jackson v. Davis*, 5 Cow. 120. "But we are not prepared to hold that this presumption arises short of twenty years from the time the mortgage debt becomes due, otherwise we might be asked to presume a debt paid before the stipulated time of payment had arrived. This presumption arises from the long delay to enforce payment; but surely no such delay can be charged until the time has arrived when the creditor is entitled to demand it. In this respect the presumption accords with the general provision of our limitation laws which limit suits to the time prescribed after the cause of action has accrued. Upon these principles no presumption of payment exists in this case. When the mortgagee is in possession, the right of the mortgagor will be barred in twenty years from the entry after breach of condition. So if the mortgagee suffer the mortgagor to remain in possession twenty years after breach of condition, payment is presumed. In both cases the time is reckoned from the breach of condition. In the first the mortgagee is usually entitled to the possession upon the execution of the mortgage, and until the debt becomes due the mortgagor can not by payment entitle himself to enter. He can of course then do nothing to interfere with the mortgagee's possession, and until the debt has become due, no presumption can arise against him." *Tripe v. Marcy*, *supra*; *Evans v. Huff*, 5 N. J. (Eq.) 360 (1846). No such presumption of payment can arise against a mortgagee or his assigns in possession, when the mortgagor became insolvent and died before the debt became due, and when his vendee of the equity of redemption also became insolvent before the maturity of the debt removed from the State, and never afterwards returned. *Brobst v. Brock*, 10 Wall. 519 (1870).

ancient transactions the law calls to its aid the doctrine of presumption under which the jury are authorized to find the existence of certain facts as to which there is no direct evidence, but which are, under the rules of law, to be reasonably inferred from certain other facts which are well established by the evidence in the case. These presumptions when they arise from lapse of time and forbearance to assert claims rest upon the principle so strongly pervading the course of men's actions in relation to their rights that individuals will appropriate to their own use and subject to their own control that to which they have the legal right, and that an abandonment for a great length of time of a legal interest without any attempt to enforce it, furnishes reasonable ground for the inference that the party has in some way parted with his interest or discharged his claim. This principle, so reasonable in itself, operates beneficially in quieting controverted titles and closing stale demands, and also protects individuals from gross injustice, arising from loss of evidence as to ancient transactions. A question has been sometimes raised whether the doctrine of presumption arising from the lapse of time and total neglect to take any measure to enforce a claim, could properly be applied to the case of a mortgage of real estate; and in some of the English cases the doctrine was advanced that the common-law presumption applicable to bonds, judgments, etc., arising from a delay of twenty years to enforce the same did not apply in the case of a mortgage, as in such cases the legal estate was in the mortgagee and the mortgagor was a mere tenant at will, and his possession was therefore the possession of the mortgagee. But this doctrine was repudiated by Lord Thurlow in the case of *Trash v. White*,¹ and by the Master of the Rolls in *Christopher v. Sparks*,² in very strong language; and the cases of debts secured by mortgages are placed on the same footing with other demands, and held liable to be defeated by the same presumptions

¹ 3 Brown Ch. 289.

² 3 Jac. & W. 222.

arising from lapse of time and laches of the mortgagee. In our own court the principle was applied in the case of *Inches v. Leonard*,¹ under circumstances, however, of greater delay, than in the present case in asserting the claim of the mortgagee. It was a case of a mortgage of forty years' standing, where there had been no possession by the mortgagee, and no attempt in the meantime to enforce the mortgage; and the court held that the plaintiff could not maintain the action. The doctrine that where the mortgagee has never entered under his mortgage and no interest has been paid for twenty years on the same, these circumstances authorize the presumption in fact that the mortgage has been discharged by payment or otherwise is one of frequent application."²

In *Wanmaker v. Van Buskirk*,³ it was said: "From all these decisions there can be no doubt that a presumption of payment may be raised by lapse of time against a mortgagee, and the better opinion would seem to be that such presumption would attach at the end of twenty years by analogy to the rule relating to bonds. Chancellor Kent, in the case cited, appears to favor this opinion, and to incline with the Master of the Rolls in the case of *Boehm v. Wood* to put the mortgagor and mortgagee when in possession in the same plight. The rule of presumption has long been adopted in favor of the mortgagee; so that when he has been in possession twenty years, the mortgagor will not be let in to redeem. I see no objection to the adoption of a rule by this court that a lapse of twenty years, without payment or demand of principal or interest, shall raise a presumption of payment in the case of a mortgage. Our statute bars the recovery of the debt after sixteen years; and after twenty years the right of entry is gone, and the mortgage is no longer a subsisting title; why should the

¹ 12 Mass. 379.

² *Collins v. Terry*, 7 Johns. 278; *Jackson v. Wood*, 12 Id. 242; *Jackson v. Pratt*, 10 Id. 381; *Giles v. Barremore*, 5 Johns. Ch. 552.

³ 1 Saxt. Ch. (N. J.) 695 (1833).

mortgage still be valid in a court of equity. But I am not called on to establish such a principle or to say that the English doctrine is strictly applicable here. Admitting it to be so, and this case to be within it, it does not determine the right of the parties. It raises a presumption that the mortgage is satisfied, and I am willing to admit that such presumption is raised in favor of the payment of this mortgage, by the lapse of twenty-three years without payment or demand of interest. It is, nevertheless, but a presumption. Standing alone, without explanation, it would prevail, and be tantamount to absolute proof, as well in equity as at law; and this not because of any actual belief that the debt has been paid, but because it is right that possession should be quieted. But the presumption may be rebutted by a variety of circumstances."

C.

I. It is proved that a testator long since dead left considerable personal property. The presumption arises that legacies charged upon his real and personal estate have been paid.¹

II. B. by his will left a legacy to F. appointing C. his executor. The legacy was to be paid in 1808. In 1829 F. brought a suit against C. for the legacy. The presumption is that it was paid.²

"Legacies," it was said in case I., "not being within the statute of limitations, fall within the rule of presumption. After a lapse of twenty years bonds and other specialties, merchants' accounts, legacies, mortgages, judgments, and indeed all evidences of debt excepted out of the statute are presumed to be paid. The court will not encourage the laches and indolence of parties, but will presume after a great length of time some compensation or release to have been made."

¹ *Fuhrman v. London*, 13 S. & R. 386; 15 Am. Dec. 608 (1825); *Hayes v. Whittall*, 18 N. J. (Eq.) 241 (1861).

² *Foulk v. Brown*, 3 Watts, 212 (1834); *Bentley's Appeal*, 99 Pa. St. 504 (1883); *Bonner v. Young*, 68 Ala. 35 (1890).

D.

I. It appears that from 1807 to 1818, H. was an inhabitant of the town of S., and was assessed for taxes. In a suit brought in 1840, the presumption is that these taxes are paid.¹

II. An assessment was made in 1837 on the property of A. The presumption is, in 1862, that it has been paid.²

"Taxes," it was said in case I., "can not have any higher character than debts due by specialty and of record. As to these a presumption of payment arises after the lapse of twenty years if there is no evidence to repel it, and to show that the debt is still unsatisfied. The assessment is in the nature of a judgment, and the warrant for the collection operates like an execution. There is no reason, therefore, why the same principle should not be applied in both cases."

E.

I. A suit is brought on a judgment recovered more than twenty years before. The presumption is that it has been paid.³

II. A judgment rendered in 1842 is sued on in 1868. The presumption is that it is paid.⁴

F.

I. A man conveyed in 1826 his interest in some land to a trustee for the payment of certain creditors and the balance to his wife. In 1847

¹ *Hopkinton v. Springfield*, 12 N. H. 328 (1841).

² *Fisher v. Mayor of New York*, 6 Hun, 64 (1875); *Hopkinton v. Springfield*, 12 N. H. 328 (1841); *Dalton v. Bethlehem*, 20 N. H. 505 (1846).

³ *Bird v. Inslee*, 23 N. J. (Eq.) 363 (1873); *Kinsler v. Holmes*, 2 S. O. 483 (1871); *Miller v. Smith*, 16 Wend. 425 (1836); *Inches v. Leonard*, 12 Mass. 379 (1815); *Barned v. Barned*, 21 N. J. (Eq.) 245 (1870). From less than twenty years the presumption does not arise. *Daby v. Erickson*, 45 N. Y. 786 (1871); *Lesley v. Nones*, 7 S. & R. 410 (1821).

⁴ *Chapman v. Loomis*, 36 Conn. 459 (1770), and see *Wills v. Gibson*, 7 Pa. St. 154 (1847); *Holman's Appeal*, 24 Pa. St. 174 (1854); *Rhodes v. Turner*, 21 Ala. 310; *Barnett v. Tarrance*, 26 Ala. 463; *Blackwell v. Blackwell*, 33 Ala. 57; *McCartney v. Bone*, 40 Ala. 533; *Ragland v. Morton*, 41 Ala. 344; *Worley v. High*, 40 Ala. 171; *Yarnell v. Moore*, 3 Cold. 173 (1866); *Bender v. Montgomery*, 8 Lea, 536 (1881).

the law will presume that the debts have been paid and the trust executed.¹

G.

I. A covenant to deliver property is made by A. to B. After a lapse of time the presumption of performance arises.²

In case I. it was said: "It is contended that the presumption is applicable only to the case of an obligation for the payment of money, and not to a covenant for the delivery of property, or the performance of other duty. It is believed that the reported cases are generally of the former description; but the principle upon which the presumption is founded applies as strongly, if not more so, to those of the latter kind. Payment of a bond for money after a lapse of twenty years, where there has been no demand on one side, or acknowledgment on the other, and no circumstance is shown which could have hindered, or impeded the recovery, is presumed, because the existence of the debt under those circumstances, is incompatible with the ordinary motives and the general course of human conduct. The presumption of payment, in such a case, arises, therefore, from what is commonly observed to happen in the transactions between man and man. Now, as a covenant for the payment of property may in general be easily performed by the one party, and in proportion to the value, must be of the same importance to the other, to have it performed, as if it were a bond for the payment of money, the lapse of time must afford a strong reason to infer a performance in the one case as it does to infer a payment in the other; and, accordingly, experience shows that there is as great a degree of punctuality commonly ob-

¹ *Drysdale's Appeal*, 14 Pa. St. 531 (1860); *Webb v. Dean*, 21 Id. 31 (1863); *Prevost v. Gratz*, 6 Wheat. 481 (1845); *Coleman v. Lane*, 26 Ga. 515 (1858). And that an estate was duly distributed. *Hooper v. Howell*, 53 Ga. 323 (1874). And, after twenty years, that an administrator was qualified. *Battles v. Holley*, 6 Me. 145 (1829); or has made a settlement. *Austin v. Jordan*, 35 Ala. 642 (1860); *Gregg v. Bethea*, 6 Port. (Ala.) 9 (1837).

² *Phillips v. Morrison*, 3 Bibb, 106; 6 Am. Dec. 638 (1813).

served in the performance of such a contract, as there is in the payment of a debt due by bond."

RULE 72. — The presumption under Rule 71 does not arise from lapse of time alone short of twenty years; but a shorter time, in connection with other circumstances, may raise a presumption of fact that payment has been made.

"When we hear of less than twenty years being left to the jury," it was said in a Pennsylvania case, "it must be understood to have been in connection with other circumstances."¹ This seems to be well settled.²

"A legal presumption of payment of a bond or covenant given for the payment of money does not arise from mere lapse of time where the bond or covenant has not been due for twenty years before commencement of suit or proceedings for the recovery of the amount thereby due and payable. If a shorter period, even a single day less than twenty years, has elapsed, the presumption of satisfaction from mere lapse of time does not arise. While the mere lapse of twenty years without explanatory circumstances affords a presumption of law that the debt is paid, even though it be due by specialty, still payment may be inferred by the jury from circumstances with the lapse of a shorter period of time than twenty years. When an action is brought on a bond or covenant for the payment of money,

¹ *Henderson v. Lewis*, 9 S. & R. 334 (1833); *Ross v. McJunkin*, 14 *Id.* 364 (1836); *Ross v. Darby*, 4 Munf. (Va.) 428 (1815).

² *Brubaker v. Taylor* 76 Pa. St. 83 (1874); and see *Groves v. Steel*, 3 La. Ann. 280 (1848); *Briggs' Appeal*, 98 Pa. St. 485 (1880); *Sadler v. Kennedy*, 11 W. Va. 187 (1877); *Colwell v. Prindle*, *Id.* 307 (1877); *Daby v. Erickson*, 45 N. Y. 786 (1871); *Clark v. Hopkins*, 7 Johns. 556 (1811); *Stockton v. Johnson*, 6 B. Mon. 408 (1846). In *Didlake v. Robb*, 1 Woods, 682, Hill, J., said: "Aside from the statute of limitations, * * * the rule is well settled that after a debt has remained due and payable for sixteen years, the law holds such lapse of time as *prima facie* evidence of payment, which *prima facie* evidence may be rebutted by proof of a subsequent promise to pay, or some reasons why suit was not brought; and after the lapse of twenty years the presumption of payment becomes conclusive." It would be hard to say where the judge found such a rule announced as well settled. It is loose language of this kind in judicial opinions that occasions so much confusion and uncertainty in the law.

if twenty years elapse between the time of its becoming due and of the institution of the action or proceeding, the defendant may without pleading the statute of limitations rely upon presumption of payment; and upon issue joined on plea of payment, payment may be inferred by the court or jury from circumstances coupled with a lapse of a shorter period than twenty years.¹

In *Colsell v. Budd*,² Lord Ellenborough said: "After a lapse of twenty years a bond will be presumed to be satisfied; but there must either be a lapse of twenty years, or less time, coupled with some circumstance to strengthen the presumption. Here, if it has been proved that the parties had accounted together after the money became payable, it might have been inferred that it was included in the settlement; but as there is no evidence of this, and as twenty years have not elapsed since the bond was forfeited, it can not be considered as discharged."

Illustrations.

I. K. gave C. in 1837 a sealed note payable in sixty days. After both K. and C. were dead an action was brought (in 1852) on this note. C. had a running account at K.'s store from 1836 to 1839, and payments were made to amounts more than the note during this time. K. resided near C. until his death. These facts raise the presumption that the note was paid.³

II. An action is brought on a bond payable in installments. Nineteen years and ten months have elapsed since the last installment became due, and another installment had become payable more than twenty years before the suit was brought. The judge instructed the jury that as to the last installment they may, and as to the other they must, presume payment.⁴

III. A judgment is recovered in 1857. In 1874 (sixteen years), a *scire facias* is issued to revive it. The defendant swears that he expected to prove that it had been fully paid out of the proceeds of a sheriff's sale of his land, in the proceeds of which the plaintiff had participated; that

¹ *Colwell v. Prindle*, 19 W. Va. 640 (1892); citing *Sadler v. Kennedy*, 11 *Id.* 187; *Perkins v. Hawkins*, 9 Gratt. 656; *Goldhawk v. Duane*, 2 Wash. C. C. 233.

² 1 Camp. 27 (1807).

³ *King v. Coulter*, 2 Grant's Cas. 77 (1863).

⁴ *Miller v. Evans*, 2 Oranch C. C. 73 (1813).

he can not state the payments, being unable after search to obtain the sheriff's docket. The presumption of payment arises.¹

IV. A transcript of a justice of the peace is filed in a Superior Court nineteen years after the judgment was rendered. The justice is not called nor the docket produced, and there is nothing to show whether an execution has ever been issued. The presumption arises of payment.²

V. A debt on a bond due in eighteen years and a half is sued on. It appears that during this time the creditor was a poor man and the debtor a rich one. The presumption of payment arises.³

VI. R. sues G. on a note payable in 1860; the action is brought in 1872. On several occasions after the note matured R. came to G., wanting to sell him some stock in a company, on the ground that he needed the money, and after much persuasion G. purchased the stock. Nothing was said about the note. The presumption arises that the note was paid.⁴

In case I. it was said: "It was fifteen years, four months and twenty-five days after the sealed note of the plaintiff's testator matured before this action was instituted for its recovery. No legal presumption of payment, such as unrebutted the court would be bound to declare as a conclusion of law, arose in that time, for the authorities all agree in fixing twenty years, from analogy to the English statute of limitations concerning real estate, as the period necessary to such a presumption. But the question is whether the time that did elapse was competent in connection with such circumstances as were offered to go to the jury as ground for their presuming payment of the note. * * * The competency of such evidence does not depend on a particular period of years, though its effect will be proportioned to their number. The presumption strengthens as the time approaches to twenty years, and the circumstances needed to establish it may be measured by a diminishing scale. The further the time stops short of twenty years the more cogent and decisive must be the circumstances relied on. Just as the further we advance beyond twenty years we require more per-

¹ Moore v. Smith, 51 Pa. St. 183 (1876).

² Diamond v. Tobias, 13 Pa. St. 313 (1849).

³ Hughes v. Hughes, 54 Pa. St. 341 (1867).

⁴ Garnier v. Renner, 51 Ind. 374 (1875).

sua-sive circumstances to rebut the legal presumption. Twenty years assumed as the point for that presumption, the scale is reversed by which we measure the circumstances that tend to establish or countervail it. In both instances it is for the jury to apply the proofs under the direction of the court. If evidence be offered which, in the judgment of the court, will, in connection with the lapse of time, reasonably tend to convince the jury that the sealed debt has been paid short of twenty years, or that it has not been paid, notwithstanding that period, it is the duty of the court to receive it, and to submit it to the jury with such instruction as shall enable them to estimate it at what it is really worth. The point to be attained is moral conviction of a fact, and whilst it is not to be founded on evidence insufficient to convince reasonable men, we are not to exact mathematical certainty, nor to expect more than moral demonstration."

"More than sixteen years," it was said in case III., "had elapsed. A legal presumption of payment does not indeed arise short of twenty years, yet it has been often held that a less period, with persuasive circumstances tending to support it, may be submitted to a jury as a ground for a presumption of fact."

In case IV. it was said: "The rule is well established that where the period is short of twenty years the presumption of payment must be aided by other circumstances beyond a mere lapse of time. But exactly what these circumstances may be never has been nor never will be defined by the law. There must be some circumstances, and where there are any it is safe to leave them to the jury. Here there were several circumstances. No certificate was given by the justice that he had issued execution, to which there was a return of *nulla bona*; and this was important, as the record still remained before the justice, who might receive the money or collect it by execution. And there was the pregnant circumstance that the plaintiff produced hearsay evidence that the transcript was genuine, and that

the justice had said that the docket was lost. The justice was not produced himself to show that the docket was lost and that search was made for it. This would have been unnecessary if the transcript had been entered in any reasonable time; but after the lapse of nineteen years and and seven months it would seem to be a reasonable duty on the part of the plaintiff, and the absence of which might fairly be taken into consideration. * * * On the whole, we think the judge did not err in submitting all the circumstances in evidence to the jury, from which, if they were satisfied, they might infer or presume payment."

In case V. it was said: "That a complete legal presumption of payment of a bond or other instrument of like nature does not arise short of twenty years is well settled; but it has also been well settled that a shorter period, aided by circumstances which contribute to strengthen the presumption of payment by lapse of time, may be submitted to a jury as grounds for the presumption of the fact of payment. Slight circumstances may be given in evidence for that purpose in proportion as the presumption strengthens by the lapse of time; but still they must be such as aid the presumption arising from time. They must be, as it is said, persuasive that the time would not have been suffered to elapse had the debt remained unpaid. * * * To aid the presumption of payment from the lapse of time the defendants offered evidence of what they called the needy circumstances of the obligee and the easy and solvent circumstances of the obligor. No doubt * * * evidence to prove this is entirely competent."

In case VI. the court said: "The circumstance was of such a nature as tended strongly to support the theory that the note had been paid. The conduct of R. on that occasion was wholly inconsistent with the idea that the note was unpaid. He was pressed for money, and if the amount of the note was then due him and his partner from G. it is hardly possible that he would not then have demanded its payment."

RULE 73.— A statute of limitations prohibits the action after the legal period, but the presumption of law arising from lapse of time may be rebutted¹ (A). And the term fixed by the statute of limitations can not be shortened by lapse of time alone (B).

After twenty years the presumption of payment arises, unless there are circumstances to account for the delay, and if there are no such circumstances it becomes a presumption of law, and the question should not be submitted to the jury. "If there had been any circumstances, anything but the lapse of time, to charge the jury on, that should have been left to the jury; but where there was none the presumption of law on the fact is that the judgment was satisfied. The court did no more, and if they had done less they would have committed an error. On the twenty years unexplained there was nothing to leave to the jury; they had no belief to exercise on it; it is because there are no means of belief or disbelief the presumption of fact arises; the presumption holds the place of particular and undivided belief. It prevails because the presumption of law is that the obligor in that long time has lost his receipts and vouchers, or the witnesses who could prove the payment might be dead. The jury might not have believed; this court might not believe the fact of payment, but that specific belief is not necessary. For wise purposes the law has raised this general presumption. The laying down any other rule would be destroying all legal presumption. The position of the court below is justified by the opinions of all the judges in England in *Grantwicke v. Sampson*,² that "the judges have bound it down as an irrevocable rule that if there be no demand for money due on a bond for twenty years they will direct a jury to find it satisfied from the presumption arising from length of time." "3

¹ *Lyon v. Guild*, 5 Heisk. 175 (1871); *Thorpe v. Corwin*, 20 N. J. (L.) 311 (1844).

² 2 Atk. 154.

³ *Cope v. Humphreys*, 14 S. & R. 21 (1835); *Webb v. Dean*, 21 Pa. St. 31 (1853).

*Illustrations.***A.**

I. A. in 1836 gives B. a bond payable in 1838. In 1860 B. brings suit on the bond. The presumption is that it is paid. But it appears that in 1841 A. stated to B. that he did not intend ever to pay the bond, as B. had taken so much from their father. This rebuts the presumption. A statute provides that no action shall be brought on a specialty debt after twenty years unless the debtor during or after that time has made a new promise to pay the debt. The action against A. can not be maintained, notwithstanding his acknowledgement.¹

In case I. it was said: "That presumption which the law raises after a lapse of twenty years that a bond or specialty has been paid is in its nature essentially different from the bar interposed by the statute of limitations to the recovery of a simple contract debt. The latter is a prohibition of the action, the former *prima facie* obliterates the debt. The bar is removed by nothing less than a new promise to pay, or an acknowledgment consistent with such a promise. The presumption is rebutted, or, to speak more accurately, does not arise where there is affirmative proof beyond that furnished by the specialty itself, that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor. The statutory bar is not removed without a new promise or its equivalent, because suit on the old contract is prohibited, and the debtor can only be liable therefore on the contract expressly made by the new promise or implied from an acknowledgment of continued indebtedness, the old debt being the consideration for the new engagement. This is the logic of the matter, though it is true the pleadings have not been moulded accordingly. We still declare on the old debt, and give the new promise in evidence; but, notwithstanding this incongruity, the liability which the law enforces arises out of the new contract. * * * The statute of limitations is a bar whether the debt is paid or not. Not so where suit is brought on a sealed instrument. The fact of indebtedness

¹ Reed v. Reed, 45 Pa. St. 239 (1863).

is then in controversy, and the legal presumption of payment from lapse of time is nothing more than a transfer of the *onus* of proof from the debtor to the creditor. Within twenty years the law presumes that the debt has remained unpaid, and throws the burden of proving payment upon the debtor. After twenty years the creditor is bound to show by something else besides his bond that the debt has not been paid, because the presumption raises only a *prima facie* case against him. It must be borne in mind that the presumption from lapse of time is not that there is no contract existing between the parties. If it were, proof of a new contract might be necessary. It is only an inference that the debtor has done something to discharge the debt, to wit, that he has made payment. Hence it is rebutted by simple proof that payment has not been made, and the facts being established, whether they are sufficient to rebut it is a question for the court and not for the jury. The presumption is one drawn by the law itself from a given state of facts, and whether it exists or not is necessarily for the court."

The character of the creditor for strictness and closeness in the collection of his debts is relevant on the presumption of payment by lapse of time.¹ For a like reason in a Pennsylvania case it is said: "While on the one hand the party seeking to recover a demand may introduce any circumstance, however slight, having a tendency in the least degree to defeat the presumption (of payment), so he who relies on it may strengthen and support it by any fact which legally and naturally has that effect. In the present case the heirs of a man are seeking indirectly to recover a claim due more than thirty years before suit brought. To show that this man in his life-time and during the progress of these thirty years was in needy circumstances and pressed by his creditors in various suits for large sums of money which ended in the recovery of judgments and executions

¹ *Leiper v. Erwin*, 5 Yerg. 97 (1833); *Kilpatrick v. Brashaer*, 10 Heisk. 373 (1873).

against him, was but calling in aid of the legal presumption, the strong natural inference that one so harassed by his creditors and apparently in want of money for the payment of his debts, would not have permitted his debtor to a large amount to escape for so long a time a demand of payment by suit. * * * But it is said the record of these judgments should not have been received, because it appeared all of them had been satisfied. But though this circumstance may have weakened the effect their introduction was intended to produce, it certainly did not altogether destroy it.”¹

B.

1. A mortgage given by A. to B. falls due in July, 1819. Proceedings to foreclose it are commenced in June, 1839. In a subsequent action to recover possession defendant asks that it shall be submitted to the jury whether from lapse of time payment should not be presumed to have been made before its foreclosure. A statute of the State provides that “after the expiration of twenty years from the time the right of action shall accrue upon any sealed instrument by the payment of money, such right shall be presumed to have been extinguished by payment.” No presumption can arise from mere lapse of time short of twenty years.²

“We take it,” said the court in *Grafton Bank v. Doe*,³ “to be well settled that courts are never at liberty to presume payment from mere lapse of time in any period less than that which is fixed by the statute of limitations. To hold otherwise would virtually be a repeal of the statute. No doubt lapse of time, connected with other circumstances, and evidence tending to prove payment, may legitimately aid in establishing the fact.” But if besides the lapse of time there are other circumstances showing that payment has been made the jury may presume payment.⁴

Presumption of payment of a bond can not be raised by a lapse of less than the statutory time alone; in connection with other circumstances alone it may. In *Henderson v.*

¹ *Levers v. Van Buskirk*, 4 Pa. St. 314 (1846.)

² *Ingraham v. Baldwin*, 9 N. Y. 45 (1853).

³ 19 Vt. 467 (1847).

⁴ *Milledge v. Gardner*, 33 Ga. 397 (1863); *Mayor of Kingston v. Horner*, 1 Cowp. 103.

Lewis,¹ judgment had been recovered on a bond which became due eighteen years and three months before suit was brought; during this time there had been indorsed on it a credit of a year's interest and a small part of the principal. On appeal the court said: "The rule with respect to the presumption to be drawn from lapse of time is derived by analogy from the English statute of limitations concerning writs of entry into land, and the statute of limitations concerning writs of error; and it is adopted by courts of law and by courts of equity; by the former not only in the case of a stale claim on a bond, but in the case of a peaceable possession of a franchise or incorporeal right; and by the latter in the case of a bill by a mortgager to redeem, and in the case of a bill of review. Our act of assembly restrains the commencement of actions for recovering the possession of lands to twenty-one years from the time the right of entry first accrued; but the rule, as styled in analogy to the English statute, the limitation in which is only twenty years, was here adopted, before our act was passed; and it was not afterwards worth while to alter it merely for the sake of preserving the analogy. But the rule is in the nature of a statute of limitations, furnishing not indeed a legal bar, but a presumption of facts, and although less than conclusive, yet *prima facie* evidence of it, and therefore sufficient of itself to cast the burden of countervailing evidence on the opposite party. When less than twenty years has intervened, no legal presumption arises, and the case not being within the rule is determined on all circumstances; among which, the actual lapse of time, as it is of a greater or a less extent, will have a greater or a less operation. All this is so clearly stated by Lord Mansfield, in the *Winchelsea Causes*,² as to leave no doubt of the origin and nature of the rule. In the case of a debt accruing by reason of a specialty, it was necessary for the sake of convenience and repose to establish some certain

¹ 9 S. & R. 379 (11 Am. Dec. 733) (1823).

² 4 Burr. 1263.

period after which payment should be presumed from lapse of time alone; and that period was, in analogy to the statute of limitations, fixed at twenty years. But it is to be observed, there is an obvious distinction between length of time sufficient in itself to raise a legal presumption of the kind which I have mentioned, and length of time which, although insufficient for that purpose may, nevertheless, in connection with other circumstances, fairly enter into the estimate of the proof to be derived from the whole evidence. The rule is applicable only to the first, because no legal presumption of the fact can be obtained from the second, and *stabitur presumptioni, donec probetur in contrarium* can not be predicated of it; it is a matter exclusively for the consideration of the jury. A want of attention to this has, I apprehend, given rise to the loose *dicta* of Lord Mansfield and other judges of the length of time necessary to found a presumption of payment, being about twenty years, and of cases having been left to the jury where it was but eighteen. To deprive the rule of fixed limit would, besides rendering its application in most cases difficult and uncertain, change its very nature, and destroy all analogy to the statutes of limitations from which it was derived. If eighteen years be left to the jury as sufficient in one case, why may not seventeen, or any less number, be left to them as sufficient in another? But the presumption is not subject to the discretion of the jury; they are bound, where it operates at all, to adopt it as satisfactory proof till the contrary be made out; and hence, when we hear of less than twenty years being left to the jury, it must be understood to have been in connection with other circumstances, and not as making out the defendant's case in the first instance, but as going for just as much as the jury might, under all the circumstances, estimate it to be worth. In the case before us there was not a lapse of time sufficient to authorize a presumption of payment, and as there was nothing in aid of the time which actually elapsed, I am of opinion the cause was properly put to the jury."

RULE 74. — The presumption of payment may be rebutted under Rule 73 by showing (at any time during the period which creates the presumption) an acknowledgment of the debt by the debtor (A); or a payment of part of it (B), or a known or notorious insolvency (C) or incapacity (D) of the debtor; or by evidence of the relation (E), situation (F), or intention (G) of the parties; or by other circumstances explanatory of the delay (H).

In *Hillary v. Waller*,¹ the chancellor said: "Then as to a presumption of title. First as to a bond taken, and no interest paid for twenty years; nay, within twenty years, as Lord Mansfield has said; but upon twenty years the presumption is that it has been paid, and the presumption will hold unless it can be repelled; unless insolvency or a state approaching it can be shown, or that the party was a near relation, or the absence of the party having the right to the money, or something which repels the presumption that a man is always ready to enjoy what is his own."

Illustrations.

A.

I. A. gives B. a bond for the payment of \$300 in 1817. An action is brought on it in 1845. The presumption that it is paid is rebutted by proof that in 1837 A., in the presence of a witness, acknowledged that it was still due.²

II. C. brings suit against D. on a bond payable over twenty years, before action. D. during this time, and within twenty years, admitted that it was due, but said he had a defense to it. There is no presumption that it was paid.³

III. F. sues G. on a bond more than twenty years after it was due. But during this time G. has twice stated that he would not pay it, as F.

¹ 12 Ves. 267 (1806).

² *Eby v. Eby*, 5 Pa. St. 435 (1846); *Bissell v. Jandon*, 16 Ohio St. 498 (1836). And a demand proved to have been made on the debtor by the creditor rebuts the presumption. *Shields v. Pringle*, 2 Bibb, 287 (1811); *Wanamaker v. Van Buskirk*, 1 Saxt. Ch. (N. J.) 685.

³ *Stout v. Levan*, 3 Pa. St. 236 (1846).

had obtained more than he from their father. This rebuts the presumption of payment.¹

IV. C. gives a mortgage on his land to H. in 1854. In 1874 H. dies, leaving the mortgage to his daughter M. In 1879 M. asks C. for an acknowledgment that the mortgage, on which nothing had ever been paid, was a valid security, to which C. agrees, making a memorandum to this effect on the mortgage. M. subsequently assigns the mortgage to E., who sends it to C. to get an admission of the genuineness of his signature. C. keeps the mortgage, and afterward states that it is lost. These facts rebut the presumption of payment.²

In case I. it was said: "The legal presumption of payment which the law allows at the expiration of twenty years after the debt becomes due is an act of tenderness toward the debtor which is sustained by the absence of evidence, and like other presumptions, must yield and give way before any circumstances and facts on which the mind can rest with satisfaction by which it is rebutted or repelled. It has not the power or effect of a positive statutory enactment of limitation or oblivion which extinguishes the original demand, and requires a new promise to pay or its equivalent. The mind must be free to admit the presumption, and if the exhibition of facts or circumstances interdict and forbid the conclusions, the protection is removed. * * * There could be no doubt, whatever, that an acknowledgment of the debt before the efflux of twenty years excluded the legal presumption of payment. The question raised and argued was as to the competency of an acknowledgment after the expiration of twenty years from the time the bond became due. The court did not err in their instruction to the jury. The burden of proof lies on the plaintiff; and if he satisfies the jury by proper evidence that the defendant, after the expiration of twenty years, admitted the existence of the debt, it would be converting legal presumption into credulity to instruct a jury that they were authorized to presume payment against positive evidence. The legal

¹ *Reed v. Reed*, 46 Pa. St. 239 (1863).

² *Murphy v. Coates*, 33 N. J. (Eq.) 434 (1881).

presumption of payment would be changed into a legal and peremptory bar, contrary to all authority."

In case II. it was said: "The suit was not brought within twenty years from the date of the bond and the debt payable. Twenty years' delay unaccounted for pays the debt. * * * This payment is by operation of law. After that time, if not accounted for, the debt is presumed to be paid. This presumption as a bar is conclusive of its payment unless it is rebutted by countervailing proof. This presumption may be overcome by proofs of various kinds of facts and circumstances. Payment of money in part discharge of the present existing debt; an acknowledgment that the debt is still unpaid and due will rebut this presumption of payment. It is not reasonable to presume a debt paid which the debtor says was not paid."

"It would be absurd," said the court in case III., "for the law to presume in the case of such admission that it had been paid. All presumptions are in accordance with what is usual, not against it. True, the defendant added to his admissions the expression of a purpose not to pay, giving as a reason not that he had paid, but that the plaintiff had obtained more than he had under the will of their common father. This might be important if it was necessary to show that a new obligation had been assumed, but it only strengthens, if possible, the evidence that the debt remained unpaid."

"But the presumption of payment," it was said in case IV., "which arises in regard to mortgages from lapse of time, without payment of interest or demand made, is only a presumption, and it is one which may be rebutted. In this case C. has acknowledged both verbally and in writing that neither principal nor interest has been paid."

But the fact that the debtor had during the twenty years said to a stranger that he would not pay the debt (a legacy) because the creditor was rich enough without it was held insufficient. "When a person," said the court, "in con-

versation with a stranger respecting the claim of another, says he will not pay it, there is not the same reason for inferring recognition that exists when the creditor requests and its debtor refuses payment. In the latter case not to deny is to admit. Besides the debt is claimed. But it does not concern the stranger whether the claim is existing or has been paid. He has no right to ask payment.”¹

B.

I. T., H. and S. sign a bond payable in 1880. The presumption in 1881 is that it is paid. But it appears that in 1868 T. became bankrupt, and his assignee paid T.'s share of the obligation. This rebuts the presumption which had arisen in favor of H. and S.²

C.

I. A judgment is entered against L. in the year 1818 for over one thousand dollars. The presumption in 1846 is that it is paid. It is shown that many judgments and executions were issued against him after that, and that from 1820 to the present time he was insolvent and unable to pay his debts. This rebuts the presumption of payment.³

II. While A. and B. lived in Virginia, A. gives B. a bond payable in 1811. In 1812 A. removes to North Carolina and then to Mississippi, where he lives till he dies in 1819. He is during this time in most destitute circumstances except for about eighteen months at one time, when he is in possession and appears to be the owner of considerable property. In an action brought on the bond in 1837 the presumption of payment is rebutted by his insolvency. And the fact of insolvency is not affected by the interval of solvency of which the creditor could not have known.⁴

III. The presumption of the payment of a bond being rebutted by proof of the insolvency of the obligor during all the time, it appears that he had a reversionary interest in certain shares which did not vest in him until a short time before action brought, and of which the creditor was ignorant. This does not affect the rebuttal.⁵

¹ Bentley's Appeal, 99 Pa. St. 500 (1882).

² Belo v. Spach, 65 N. C. 192 (1881); Hamlin v. Hamlin, 8 Jones (Eq.) 121. So as to the payment of interest. Shields v. Pringle, 2 Bibb, 387 (1811). But the evidence of a joint obligor of a bond that he had not paid it is not admissible to repel the presumption arising from lapse of time. Rowland v. Windley, 36 N. C. 36 (1832).

³ Farmers' Bank v. Leonard, 4 Harr. (Del.) 537 (1848); McClellan v. Crofton, 6 Me. 334 (1830); Fladong v. Winter, 19 Ves. 197 (1812); Wynne v. Waring, 1 Term Rep. 276; Kilpatrick v. Brashaer, 10 Meak. 573 (1873); Hopkirk v. Page, 2 Brock. 20 (1823).

⁴ McKinder v. Littlejohn, 4 Ired. (L.) 198 (1843).

⁵ McKinder v. Littlejohn, 1 Ired. (L.) 66 (1840).

IV. The issuance and return of an execution *nulla bona* is a circumstance rebutting the presumption of the payment of a judgment from lapse of time.¹

In case I. it was said: "It is a well established rule of law that where a debt due by specialty has not been demanded by the plaintiff or acknowledged or recognized by the defendant for twenty years, and nothing is shown to account for the delay, the debt shall be presumed to have been fully paid and satisfied. This rule applies not only to bonds, but to mortgages, judgments, recognizances, decrees, and other debts of record. If the presumption is not repelled by sufficient legal evidence, it becomes absolute and conclusive, and the jury are bound to render a verdict for the defendant, although they may individually believe that the debt has not been paid. The rule is founded on the common experience of the conduct of men in relation to the transaction of business; and was intended for the security and repose of society, by discountenancing suits for stale demands and discouraging the laches and negligence of parties in delaying to prosecute their claims for an unreasonable length of time when they had the means and opportunity of enforcing them. The rule also was intended for the protection of the debtor whose receipts or vouchers may perhaps be lost, or witnesses be dead or removed; or the true state of the transactions be otherwise obscured by lapse of time. It is better for the peace and repose of society and the ends of justice that the presumption arising from lapse of time should be adhered to, and not be easily rebutted; although in many cases it may be contrary to the actual truth of the case. Although this rule is well established, it is equally well settled that in all cases the presumption of payment arising from lapse of time may be repelled by countervailing evidence which satisfies the minds of a jury that the debt is still due and unpaid. The evidence for this purpose must consist (1) of an uncondi-

¹ Black v. Carpenter, 3 Bart. 350 (1874).

tional and unqualified acknowledgment or admission, either express or implied, on the part of the defendant within twenty years of the justness of the claim, and that it is still due; or (2) a payment on account of either the principal or interest, either of which is an implied recognition of the debt; or (3) the situation, condition, or circumstances of the parties, such as the absence of the plaintiff or the defendant in a foreign country, or the insolvency or embarrassment of the plaintiff or the defendant. There is no evidence either of the first or second description. But the plaintiffs contend that there is sufficient and competent evidence of the third description to rebut the presumption of payment in the present case. The question is presented whether the poverty or insolvency of the defendant or a state approaching or manifestly tending to insolvency is admissible in evidence. The court are of opinion that it is. The indigent circumstances of a creditor who holds a bond and had the opportunity to collect it from the debtor but makes no demand of payment, either of the principal or interest, for a period of twenty years, afford strong presumptive evidence of payment or satisfaction. So on the other hand and for the same reason the indigent circumstances of a debtor, his hopeless insolvency and inability to pay his debts, are properly admissible in evidence for the purpose of repelling presumption of payment or satisfaction arising from lapse of time. Therefore, if the jury are satisfied that the defendant was in such a state of indigence or insolvency since the year 1820, that he was unable to pay this judgment and other debts which had priority or preference, the presumption of payment is repelled and the verdict ought to be for the plaintiffs. But if the jury are satisfied from the evidence in this case that the defendant, although in indigent or embarrassed circumstances since the year 1820, had, during that period, either from visible property or from other resources from which payment might have been coerced by the use of legal process either against his property or his person, the means of paying

this judgment and other judgments having a priority of lien upon any land or real property which he may have had, and also all other debts, which by the use of legal diligence could have been made to have a priority over this claim; or in other words, if it appears to the satisfaction of the jury that this judgment might have been collected by the use of legal process at any time since the year 1820, the presumptive bar from lapse of time is not removed, and in such case the verdict ought to be for the defendant." The jury found for the plaintiff.

In case II. it was said: "The distinction is material as preventing the possession of property by the debtor for but a short period from counteracting the effect of insolvency, as a circumstance repelling the presumption of payment. For if the debtor, living more than a thousand miles from the creditor, and in a situation between which and the place of the creditor's residence there was but little communication, should have had in possession property of value to pay the debt but for a very short time, so that the jury should think the creditor did not know of it and could not get payment out of that property, it might be regarded as being substantially a continued insolvency; especially where, as here, the debtor seems barely to have had possession of property without its appearing how he got it and whether he had paid for it."

In case III. it was said: "The presumption raised by a forbearance for twenty years may be repelled by evidence that the debtor had not the means or opportunity of paying. * * * The circumstance relied on is not sufficient to withdraw the present case from the operation of this doctrine. * * * If it could be brought home to the creditor that he knew of this interest in remainder, an inference of negligence in forbearing for so many years from any effort to subject it to his demand might be raised against him, but as the intestate himself forebore wholly, notwithstanding his necessities, from making any

use of this interest, it might be that he was ignorant thereof, and still more probable that these creditors knew not of it."

In another case it was said: "The only true rule, in such a case, is to require such a state of insolvency to be shown to have existed during the entire ten years after the maturity of the debt as will prove that the debtor *did not* pay because he *could not*, and nothing short of this will the law permit to destroy its own inference arising from the lapse of time. Besides this, in a case like the present the presumption of payment, unlike that which is raised of the death of a party from his being continually absent and unheard of for seven years, is by law referred to a particular period of time and has relation to the day on which the debt became due."¹

D.

I. M. sues O. on a sealed note due in 1840. The suit is brought in 1861. The presumption is that the note is paid. It is proved that between 1840 and 1860, O. was insane. This rebuts the presumption.²

E.

I. A. mortgages his land to B. A. is a son-in-law of B. There is no presumption, even after twenty years with no payment or demand of interest, that this mortgage has been paid.³

II. B. mortgages his land to C. After a lapse of time in which the presumption of payment would arise the rule is different where it appears that B. had died many years before, leaving a wife and children in poor circumstances.⁴

III. A father left his son A. certain land having a doubtful title, with the provision that should it be recovered from him at law, B. another son, should pay him a certain sum from the estate. The land is taken from A. by legal process in 1742. In 1788, A. sues B.'s executor for the sum. The presumption is that B. has paid A. It appears, however, that, B. "had amused A. until his death in 1785, with promises of providing for

¹ Grant v. Burgwyn, 84 N. C. 550 (1861); Powell v. Brinkley, Busb. (N. C.) 154 (1852)

² McLellan v. Crofton, 6 Me. 334 (1830).

³ Waymaker v. Van Buskirk, 1 Saxt. Ch. (N. J.) 685 (1833).

⁴ Id.

him by his will," which he never did. The presumption of payment is rebutted.¹

In cases I. and II. it was said: "The very situation of the parties is of itself sufficient to rebut the presumption. The mortgagor was a near relative; he had married the daughter of the mortgagee and had issue. The mortgagor died many years ago, leaving his wife and children in possession. They were not in a situation to pay either principal or interest. To have exacted the payment might have brought distress upon those who depended upon this property for support, and would have been harsh to say the least of it. To suffer the mortgage to remain without compelling payment was a reasonable indulgence, and ought not to be set up now for the purpose of defeating the claim. One ground for a presumption of payment growing out of a lapse of time, is that a man is always ready to enjoy what is his own. Whatever will repel this, will take away the presumption of payment, and for this purpose it has been held sufficient that the party was insolvent or a near relation."

In case III. Marshall, who was then at the bar, argued as follows: "I admit that length of time which induces a presumption that a claim has been satisfied will create an equitable bar. But this presumption may be repelled by testimony accounting for the delay, and in this case there is a sufficient reason assigned and proved for the appellant's not asserting his right at an earlier day. It appears that the testator of the appellee had been long married without having children; that he acknowledged his brother's lenity in not coercing satisfaction of his claim, and promised to make him an ample provision at his death." The court agreed with this view of the case saying: "The judge who pronounced the decree of reversal in this case seems to have considered no other question, but the presumption against the demand on account of its antiquity. It is un-

¹ *Eustice v. Gaskins*, 1 Wash. (Va.) 188 (1798).

doubtedly true in general that a right for a length of time unaffected, is subject to a presumption of its having been satisfied sufficiently strong to defeat it. But it is equally true that this presumption may be opposed by circumstances accounting for the forbearance. In this case we think a sufficient reason for the delay is assigned and satisfactorily proved."

F.

I. A bond, made by B. to A. in 1784, is sued on in 1815. The action is brought in England where A. has always lived. But from 1792 to 1815 B. has resided in America. The presumption of payment is rebutted.¹

II. Rent of a house becomes due on December 25, 1794; but is not sued for till 1816. One of the parties resides in England, the other in America. The breaking out of the war between the countries and the distance between the parties, prevents the presumption of payment from arising.²

III. During the period the time is running the parties live in the South; the war is flagrant and the courts are closed. This rebuts the presumption.³

"The principle upon which the presumption of payment arises from the lapse of time is a reasonable principle and may be rebutted by any facts which destroy the reason of the rule. That no presumption could arise during a state of war, in which the plaintiff was an alien enemy, is too clear to admit of doubt."⁴

G.

I. A bond payable on demand is executed in 1848. A suit is brought on it in 1867. The presumption is that it has been paid. It appears that though payable on demand it was not the intention of either party that it should be paid till a future time. The presumption is rebutted.⁵

¹ *Newman v. Newman*, 1 Stark. 101 (1815); *Helm v. Jones*, 3 Dana, 88 (1835).

² *Bailey v. Jackson*, 16 Johns 210; 8 Am. Dec. 309 (1819); *Shields v. Pringle*, 2 Bibb, 387 (1811).

³ *Hopkirk v. Page*, 3 Brock. 30 (1822); *Gwyn v. Porter*, 5 Helsk. 264 (1871); *Jackson v. Pierce*, 10 Johns. 415 (1813); *Montgomery v. Bruere*, 4 N. J. (L.) 266 (1818); *Hale v. Pack*, 10 W. Va. 145 (1877); *Thomas v. Hunsalcott*, 54 Ga. 537 (1875); *Kilpatrick v. Brashaer*, 10 Helsk. 373 (1873); *Cannon v. Mathis*, Id. 575 (1873).

⁴ *Marshall, C. J.*, in *Dunlop v. Ball*, 2 Cranch, 184 (1804).

⁵ *Hale v. Pack*, 10 W. Va. 145 (1877).

II. A surety to a note under seal against which by lapse of time a presumption of payment has arisen is asked during this time to sell his land to another. He replies that he can not, as the creditor if he does, will push him on the note, which he has promised not to do during his life time. This rebuts the presumption of payment.¹

In case I. it was said: "Do sufficient circumstances exist in this case to rebut the presumption of payment? I think so. The bond, it is true, was payable on demand, but the accompanying circumstances show conclusively that neither the obligors nor the obligee expected this bond to be paid promptly. It is true a legal cause of action arose the day the bond was executed; but it would have been a gross breach of good faith if the obligor had sued on it promptly. * * * The bond in this case was given by the members of a mercantile firm to a brother of one of the obligors. It was given for money advanced to them to be used in their business. And the obligee borrowed it for the express purpose of letting them have the use of it in their business. Their credit was not sufficient to enable them to borrow this money, and the obligee borrowed it on his own, simply for their accommodation. The whole object of this arrangement would have been defeated by the obligee demanding the payment of the bond promptly. Presumption of payment, under such circumstances, would be as unreasonable as the presumption that a bond was paid before it was due. Abating, therefore, such reasonable time after the bond was given before, according to the understanding of the parties, it was to be paid * * * and the time during which presumption of payment could arise in this case, would be much less than twenty years."

H.

I. A deed of trust to secure a debt is made and recorded in June, 1841. There are frequent sales of the land, some by the grantor and those claiming under him, and the purchasers have no actual notice of the

¹ Fisher v. Phillips, 4 Baxt. 262 (1874).

deed of trust until 1876. These facts rebut the presumption of payment by lapse of time.¹

RULE 75.—A presumption of payment other than by lapse of time will arise from the production of a receipt from the creditor (A); from the possession by the debtor of the security or obligation (B), or from its cancellation (C); from the payment of a later debt (D); from the passing of money between debtor and creditor after the debt is due (E); from the custom of trade (F); or from other circumstances raising an inference of payment² (G).

Illustrations.

A.

I. A. claims a horse in B.'s possession. B. produces a receipt signed by A. for a sum of money for a horse. The presumption is that A. had sold the horse to B. and had received the purchase-money.³

II. B. sues C. on a note payable in 1835. C. produces a receipt given by B. to C. subsequent to the maturity of the note, and expressed to be "in full of all demands." The presumption is that the note has been paid.⁴

III. A. gives an order on R., stating that S. wishes to buy goods of R., and that A. will be responsible for S. S. indorses on the order a receipt for goods "to the amount of \$100." The presumption is that S. had received the goods from R. to that amount.⁵

IV. A. sues B. on an account, who pleads payment, and produces a check for the amount drawn on his bank and indorsed by A. This is pre-

¹ *Bowie v. Poor School Soc.*, 75 Va. 300 (1881). For other cases in which the circumstances of the case were held to rebut the presumption of payment from lapse of time, see *Ross v. Ellsworth*, 49 Me. 416 (1860); *Hendrick v. Bannister*, 13 La. Ann. 373 (1857); *Wernet v. Missisquoi Lime Co.*, 46 Vt. 456 (1871); *Tomlin v. Howe*, 1 Gilmer (Va.), 8 (1820).

² For illustration of cases where payment has been presumed from circumstances, see *Patton v. Ast*, 7 S. & R. 116 (1821); *First Nat. Bk. v. McManigle*, 69 Pa. St. 156 (1871); *Shinkle v. First Nat. Bk.*, 22 Ohio St. 517 (1872); *Pope v. Dodson*, 53 Ill. 360 (1871); *Fuller v. Smith*, 5 Jones (Eq.), 192 (1859); *Rockwell v. Taylor*, 41 Conn. 55 (1874); *Wood v. Hardy*, 11 La. Ann. 760 (1856); *Vimont v. Welch*, 2 A. K. Marsh. 12 (1819); *Carson v. Lineberger*, 70 N. C. 173 (1874); *Robinson v. Allison*, 36 Ala. 525 (1860).

³ *Obart v. Letson*, 17 N. J. L. 78 (1839).

⁴ *Marston v. Wilcox*, 2 Ill. 270 (1836).

⁵ *Bawson v. Adams*, 17 Johns. 120 (1819); *Child v. Moore*, 6 N. H. 33 (1833).

sumptive evidence of payment, though without the indorsement by A. it would not be.¹

V. A. sues B. on a note made by the latter. On the note were written these words: "Cr. by cash rec'd, \$20," through which a pen mark had been drawn. The presumption is that the sum of \$20 had been paid on the note.²

VI. The question is whether A. has paid B. a debt due him. An account in B.'s hand and receipted by B. is produced for the amount. The presumption is that A. has paid B.³

VII. K. purchases goods from W. and is sued by W. for their price. K. produces receipts for the purchase-money signed by W. The presumption is that W. has been paid.⁴

VIII. A credit is entered on the back of a bond. It bears some evidence of an attempt to erase it, but is legible. The presumption is that the payment has been made.⁵

"The credit which was indorsed upon the note," it was said in case V. "is undoubtedly equivalent to an admission by him that so much as was credited has been paid, and there is no principle of evidence which will allow a person after he has admitted a fact, even if the admission is by parol, and not in writing, to do away the force of the admission by an after denial or withdrawal of it. Though it be afterward denied, if it were by parol only, or if it be in writing, though it be afterward erased or obliterated, the admission is nevertheless evidence against the person making it, and is entitled to all the weight of evidence of that sort, until explained away or disproved by him."

In case VII. it was said: "K. buys a lot of merchandise from W., and makes him two payments at such dates and intervals of time as would likely accrue in the management of such matters. The creditor party, diligent in claiming and collecting his dues calls for his money; the debtor

¹ *Egg v. Barnett*, 3 Esp. Cas. 196 (1810).

² *Graves v. Moore*, 7 T. B. Mon. 341 (1828).

³ *Harrison v. Harrison*, 9 Ala. 73 (1846).

⁴ *Wooten v. Nall*, 18 Ga. 609 (1855); and see *Scruggs v. Bibb*, 23 Ala. 481 (1859) as to a receipt "in full of all claims."

⁵ *Clark v. Simmons*, 4 Port. (Ala.) 14 (1836).

party, equally vigilant in guarding his rights exacts a receipt which is executed and delivered; and now when offered in proof it is rejected because, forsooth, it may be false and fraudulent and filled up to meet the case. And so it may, and so the sun which has risen in the east for six thousand years may not do so to-morrow. Experience, however, would warrant a different conclusion; and so the experience of human conduct as to transactions similar to this would justify a different presumption. Where an order for the payment of money or the delivery of goods is found in the hands of the drawee or a promissory note is in the possession of the maker, a legal presumption is raised that he has paid the money due upon it or delivered the goods ordered. So a bank-note will be presumed to have been signed before it was issued, though the signature be torn off; such being the orderly course of such business. The same presumption and for the same reason arises in favor of the genuineness of these instruments, subject to be rebutted to be sure, as are all other presumptions."

In Louisiana a presumption of payment does not arise from the failure of the claimant to include the debt in the schedule filed by him on a cession of his goods when he was ignorant of his rights at the time the schedule was made.¹

B.

I. A draft payable to his own order drawn by T. on C. is found in the possession of C. The presumption is that it was paid by C.²

II. An order for a sum of money drawn on A. by B. is produced by A. The presumption is that it was paid by A.³

III. Drafts drawn by B. on A. and accepted by A. in favor of C. are produced by A. The presumption is that A. has paid them.⁴

¹ *Trenoulet v. Cenas*, 6 Mart. (N. S.) 541; 17 Am. Dec. 195 (1838).

² *Connelly v. McKean*, 64 Pa. St. 113 (1870); *Birkey v. McMakin*, *Id.* 343 (1870).

³ *Zeigler v. Gray*, 12 S. & R. 42 (1824).

⁴ *Hays v. Samuels*, 65 Tex. 569 (1881). The presumption is that a man paying a note will take it into his possession. *Haywood v. Lewis*, 65 Ga. 224 (1880), and it is presumed that the payment was made to the person entitled to receive the money. *Lipscomb v. De Lemos*, 68 Ala. 592 (1881); *Potts v. Coleman*, 67 *Id.* 221 (1880).

IV. A. produces an order upon him signed by B., to deliver certain articles. The presumption is that he has delivered the articles.¹

This rule is founded on a reasonable principle, which is supported by numerous cases that where bills of exchange, checks, orders for the payment of money or goods, promissory notes or other obligations are paid, they, as a general rule, go into the hands of the person paying them. It is to be presumed, as already said, that a man paying a written obligation will take it into his possession.²

"When," said Lord Ellenborough to the jury in an old case, "there is a competition of evidence upon the question whether a security has or has not been satisfied by payment, the possession of the cancelled security ought to turn the scale in his favor, since in the ordinary course of dealing the security is given up to the party who pays it." ³ It has been held that where the defense of payment of a note or other security is made, and the evidence on both sides is evenly balanced, the possession by the plaintiff of the uncanceled paper will turn the scale in his favor.⁴

In case II. it was said: "No argument can be drawn either from reason or convenience why possession of an order by the person on whom it was drawn should not *prima facie* be evidence of his having paid it to some one; and this whether it was payable to bearer or only to a particular person. The presumption that the payee would not part with his security without having received satisfaction is a reasonable one, and although these orders are sometimes left with the persons to whom they are directed by

¹ Kincaid v. Kincaid, 8 Humph. 17 (1847).

² Mills v. Hyde, 19 Vt. 59 (1846); Garloch v. Geortner, 7 Wend. 196 (1831); Weidner v. Schweigert, 9 S. & R. 385 (1823); Rubey v. Culbertson, 35 Iowa, 264 (1872); Somervail v. Gillies, 31 Wis. 152 (1873); Penn v. Edwards, 50 Ala. 63 (1873); Lane v. Farmer, 13 Ark. 64 (1852); Edwards v. Campbell, 23 Barb. 423 (1856); Bedell v. CarH, 33 N. Y. 581 (1865); Union Canal Co. v. Lloyd, 4 W. & S. 393 (1843); Carroll v. Bowie, 2 H. & McC. 457 (1848); Larimore v. Wells, 29 Ohio St. 13 (1875); Bracken v. Miller, 4 W. & S. 103 (1842); Ritter v. Shenk, 101 Ill. 387 (1883); Sutphen v. Cushman, 35 Ill. 157 (1864).

³ Brombridge v. Osborne, 1 Stark. 374 (1816).

⁴ Doty v. Janes, 28 Wis. 319 (1871).

careless persons, without payment having been made, yet that sometimes occurs with receipts which accompany tradesmen's bills, and no one would pretend that a receipt attached to a bill would, therefore, not be competent. There is no necessity that the order should be indorsed by the payee, or that it be made payable to bearer; it is not as evidence of the transfer of the debt, but as extinguishment of it, that possession of the paper becomes material."

In an English case A. brought an action against B. for money paid out by him in accepting and paying bills of exchange for the accommodation of B. The bills were produced by C. It was held by the chief justice that the presumption was that he paid them, provided it was shown that they were once in circulation after being accepted.¹ "Show," said Lord Ellenborough, "that the bills were once in circulation after being accepted, and I will presume that they got back to the acceptor's hands by his having paid them. But when he merely produces them, how do I know that they were ever in the hands of the payee, or any indorsee with his name upon them as acceptor? It is very possible that when they were left for acceptance he refused to deliver them back, and having detained them ever since, now produces them as evidence of a loan of money." This ruling has been criticised by our courts. "Undoubtedly," said Sharswood, J., in a Pennsylvania case:² "they were no evidence of a loan, but having proved that they were originally lent, of which the report does not state that there was any evidence, why should not the possession of them by the acceptor, after maturity, raise the presumption that he had paid them? With the highest respect to so great an authority upon *nisi prius* law, I may be allowed to express a doubt as to the sufficiency of the reason. Contrary to established principle, it presumes a fraud to have been perpetrated when the natural presumption is that which

¹ *Pful v. Vanbatenberg*, 2 Camp. 439 (1810); and see *Scholey v. Walsby*, Peake, 25 (1820).

² *Connolly v. McKean*, 64 Pa. St. 118 (1870).

consists with honesty. Besides which it assumes that the holder acquiesced in a palpable wrong. If the drawee retains the bill an unwarrantable time, the holder could sue him in trover. It is a reason which applies as well to a bill which had been negotiated before acceptance; for the indorsee may leave it in the hands of the drawee for acceptance. When the bill is presented it is reasonable that the drawee should be allowed some time to deliberate whether he will accept or not. It seems that he may demand twenty-four hours for this purpose, and that the holder will be justified in leaving the bill with him for this period. So that even an indorsed bill produced by the acceptor after maturity would not be evidence of payment if this is a sound reason. But surely indorsed bills, checks, or orders for the payment of money are *prima facie* evidence according to the general current of the authorities."

C.

I. A. is sued on a note made by A. to the plaintiff's intestate. A. produces the note with his name cancelled. The presumption is that the note is paid.¹

II. A note made payable to A. is sued on by his representatives after his death. When produced in evidence the note has two lines drawn through its face. The presumption is that it has been paid.²

III. A mortgage is cancelled. This raises a presumption that it is discharged.³

In case I. it is said: "Pothier, in his work on Obligations, says that 'it ought to be decided generally from the possession of the debtor that the creditor shall be presumed to have given up the security, either as acquitted or released, until the creditor shows the contrary; as for instance, that it was taken surreptitiously.' He says further: 'There is sufficient ground to presume a donation

¹ Gray v. Gray, 3 Lana. 173 (1869). Same as to note with name torn off. Powell v. Swan, 5 Dana, 1 (1837).

² Pitcher v. Patrick, 1 Stew. & P. 478 (1832).

³ Trenton Banking Co. v. Woodruff, 2 N. J. (Eq.) 117 (1838).

and release of the debt when its debtor gives up the security, and the circumstance of its being in the possession of the debtor is a sufficient reason for presuming that the creditor has given it up; as that is the most natural way of the possession passing from one to the other. * * * If a promissory note or bond should chance to be found in the hands of the debtor, or if it be crossed, razed, or torn in pieces, either of these circumstances will create a presumption that it has been acquitted, which presumption will remain until clear proof be brought that the debt is still owing; as that the appearance came by violence or accident.''' In this case both circumstances concur. The note is found in the hands of the maker, and it is cancelled by the removal of the maker's name. These circumstances could not lawfully exist without the act or consent of the holder of the note, and that they occurred unlawfully will certainly not be presumed.''

In case II. it was said: "If at any time before a final trial the note or bond upon which the action has been brought undergo any alteration or receive any impression indicating its destruction or satisfaction, it would appear to be but a necessary and reasonable requisition on the plaintiff that he should afford the explanation. If the act done was the result of mistake or accident, or if any effect was designed by it different from its ordinary import he alone must be presumed to know the circumstances and to possess the means of explanation.''

D.

I. A receipt of the payment of a quarter's rent is produced. The presumption is that all former rent is paid.¹

II. A tax assessed against E. for the year 1884 is not included in the bill for 1885. The presumption is that it is paid.²

¹ *Brewer v. Knapp*, 1 Pick. 337 (1823); *Crompton v. Pratt*, 106 Mass. 255 (1870).

² *Attleborough v. Middleborough*, 10 Pick. 378 (1830); and see *Robbins v. Townsend*, 20 Id. 345 (1838).

III. The question is whether A. has paid a State tax assessed upon his lands for the year 1842. The taxes assessed on the same land are proved to have been paid by A. for subsequent years. The presumption is that the tax for 1842 is paid.¹

As said in another case like case I., this presumption arises from the improbability that the former rent remained unpaid when rent is specifically received for a subsequent period. This presumption obtains as well where several persons are entitled to receive money, as in an individual case, for they are all to be presumed conscious of their rights. This presumption may be repelled, but standing uncontradicted it is decisive.²

E.

I. It is proved that on January 1, 1880, B. borrowed a certain sum of money from A. It is also proved that on a subsequent day an unascertained sum of money passed from B. to A. The presumption is that A. was paid his debt.³

II. Two persons account with each other and one pays a balance. The presumption is that this is a settlement to date.⁴

III. A. sued B. for money alleged by him to have been loaned to B. A. testified: "B. requested me to send him \$18; I sent it and he has not paid me the same or any part of it." There was no other evidence. The presumption was that the money was due to B.⁵

"There is no principle better settled," is was said in case I., "than that where one pays money to another, in the absence of explanation as to the cause of payment, the presumption is that it was paid because it was due, and not by way of a loan. The plaintiff proved nothing more than he would have proved by the production of a draft drawn by the defendant on him, and proving that he, the plaintiff, had

¹ *Hodgdon v. Wright*, 36 Me. 337 (1853).

² *Decker v. Livingston*, 15 Johns. 479 (1818); and see *Walton v. Eldridge*, 1 Allen, 203 (1861).

³ *Swain v. Ettling*, 32 Pa. St. 486 (1859). When absence of other dealings is shown, proof of money paid by maker to payee would raise presumption that it was paid on the note. *Somervail v. Gillies*, 31 Wis. 152 (1872).

⁴ *Dowling v. Blackman*, 70 Ala. 303 (1881); *Nichols v. Scott*, 12 Vt. 47 (1840).

⁵ *Sayles v. Olmstead*, 66 Barb. 590 (1873).

paid the draft. On such evidence he could not recover against the drawer of the draft. *Prima facie*, the acceptor and payer of the draft is the party primarily liable. It is presumptively drawn against funds in the hands of the drawee. * * * The case is destitute of any circumstance which can warrant the inference that the money was advanced as a loan, unless the mere fact of the payment of money by one party at the request of another is to be considered as furnishing legal evidence, that the money was advanced as a loan. This can not be held without overturning well sustained rules."

F.

I. A brickmaker sues an architect for work and labor performed for two years before bringing the action. It is the custom to pay the workmen every Saturday night, and the plaintiff with the others has been seen waiting to receive his wages. The presumption is that the workman had been paid.¹

II. A remittance by mail is a presumption of payment where the debtor has been requested by the creditor to remit in this way, or it is the course of business.

In a case like case I. Gaselee, J., said: "In the regular course, if a servant has left a considerable time, the presumption is that all the wages have been paid, and that makes it proper to consider whether, in this case, the facts proved rebut that presumption. In a case tried a few years ago at Guild hall, which was an action by a workman at a sugar refinery, a witness proved that the plaintiff had worked there for more than two years. But Abbott, C. J., said, that he should direct the jury to presume that men employed in that way were regularly paid every Saturday night, unless some evidence was given on the part of the plaintiff to satisfy the jury that the plaintiff had, in point of fact,

¹ *Lucas v. Novisdienski*, 1 Esp. 296 (1795). The words "terms cash" on an unreceipted bill of goods sent by a wholesale to a retail dealer raise no presumption of law that the goods were paid for before they were shipped. *Wallauer v. Fellows*, 48 Wis. 105 (1879).

² *Boyd v. Reed*, 6 Helak. 631 (1871).

never been paid; and as no such evidence was produced the plaintiff was nonsuited."

G.

I. A. sues B. for the price of eleven hogs sold by A. to B. B. pleads payment. It is proved that A. went to B.'s house to settle for the hogs, that he had no money when he went in, but had when he came out, which money he stated he had received of B. The presumption is that A. was paid.¹

II. A. gives B. a promissory note. This raises a presumption that B. was not at this time indebted to A.²

III. A new note for a less sum than an old note is given in renewal. The presumption is that all claims between the parties had been adjusted.³

In case I. it was said: "If he had no money, went to defendants to settle for the hogs, and when he left them had money, and said he got it from them, it needs no argument to show that it is legitimate to presume, or at least the jury may presume therefrom, that he did settle and get his pay."

It is held in some States and jurisdictions that the giving of a negotiable paper by the debtor to the creditor for the amount of an antecedent debt is a payment of the antecedent debt.⁴ But in other States this is denied.⁵

In *Strong v. Hirst*,⁶ Dickerson, J., reviews the conflicting authorities at length: "Ever since the decision in

¹ *Whistler v. Drake*, 35 Iowa, 103 (1873). For other cases in which payment has been inferred from circumstances see *Connecticut Trust Co. v. Melandy*, 119 Mass. 450 (1876); *Alvord v. Baker*, 9 Wend. 323 (1832); *Risher v. The Frolic*, 1 Woods, 92.

² *De Freest v. Bloomingdale*, 5 Denio, 304 (1848).

³ *Piper v. Wade*, 57 Ga. 223 (1876).

⁴ *Campbell v. Hays*, 1 Ind. 547 (1849); *Kirchner v. Lewis*, 27 Ind. 23 (1866); *Grimmell v. Warner*, 31 Iowa, 11 (1866); *Green v. Russell*, 133 Mass. 538; *Ely v. James*, 123 Mass. 36; *Melledge v. Boston Iron Co.*, 5 Cush. 158; *French v. Price*, 24 Pick. 13; *Weston v. Wiley*, 78 Ind. 55 (1881); *Risher v. The Frolic*, 1 Woods, 92 (1870); *Wallace v. Agry*, 4 Mason, 336 (1837); *Tisdale v. Maxwell*, 58 Ala. 40 (1877); *Copeland v. Clark*, 2 Ala. 399 (1841); *Alabama, etc., Co. v. Sanford*, 36 Ala. 703 (1860).

⁵ *Ward v. Howe*, 38 N. H. 35 (1859); *Vall v. Vall*, 4 N. Y. 313 (1850); *Matteson v. Ellsworth*, 33 Wis. 498 (1873); *May v. Gamble*, 14 Fla. 467 (1874).

⁶ 61 Me. 9 (1871).

Thatcher v. Dinsmore,¹ the acceptance of a negotiable note or bill of exchange by the creditor for a pre-existing debt has been held to be payment of such debt, both in Massachusetts and this State, unless a contrary intention is shown. This principle, however, obtains only in these States and Vermont; the United States courts and the courts of England, New York and the other States generally holding the contrary doctrine — that the acceptance of such note or bill does not extinguish the debt, unless it is agreed that it shall operate as payment.² Such, also, is the doctrine of the civil law and of the States and countries that have adopted that system of jurisprudence.³ In order to protect a debtor who has given negotiable paper for an antecedent debt from liability to be twice charged with the same debt, the courts that adopt this latter theory of the law upon this subject, also hold in general that the note or bill must be produced and cancelled or given up before the creditor will be allowed to recover upon the original consideration.⁴ Thus, each of these different theories of the law alike protects the debtor from liability to pay the same debt twice. While such is the law in other jurisdictions, the tendency of the courts in Massachusetts and Maine has been to restrict, rather than extend the rule laid down in *Thatcher v. Dinsmore* and *Varner v. Nobleboro*,⁵ *Pomeroy v. Rice*,⁶ *Melledge v. Boston Iron Co.*,⁷ *Zeran v. Wilson*,⁸ *Perrin v. Kean*,⁹ *Paine v. Dwinal*.¹⁰ The courts in these States also hold that the presumption of payment is rebutted, and the creditor may repudiate the security taken and rely upon the original contract when there is

¹ 5 Mass. 299 (1809).

² *Peter v. Beverly*, 10 Pet. 532; *Ward v. Evans*, Ld. Raym. 928; *Musser v. Price*, 4 East, 197; *Vail v. Foster*, 4 N. Y. 312; *Ward v. Howe*, 38 N. H. 35.

³ *Wallace v. Agry*, 4 Mason, 344.

⁴ *Davis v. Dodd*, 4 Taunt. 603; *Holmes v. DeCamp*, 1 Johns. 34; *Hughes v. Wheeler*, 8 Cow. 77; *Schemmelpenich v. Bayard*, 4 Pet. 264; *Rangier v. Morton*, 4 Watts, 205.

⁵ 2 Me. 121.

⁶ 16 Pick. 22.

⁷ 5 Oush. 153.

⁸ 8 Oush. 424.

⁹ 19 Me. 355.

¹⁰ 53 Me. 52.

any fraud in giving it, or it is accepted under any ignorance of the facts or a misapprehension of the rights of the parties.¹

A payment made on a general account is presumed to have been applied to the oldest items.² Where payment is voluntarily made and accepted as a full compensation, it is to be presumed that the parties measured the loss by the same rule that the law would apply to it.³ But when the payee of a note, at the time it becomes due, takes a note for the same amount signed by persons, some of whom are not parties to the first note, and retains the first note, there is no presumption of law, in the absence of an agreement to that effect that he receives the second note in payment of the first.⁴ The presumption of law is that a bill or order on a third person for a debt is taken as a conditional payment only.⁵

RULE 76.—The presumption in Rule 75 (B and C) does not arise, where the debtor had the means of obtaining possession of or of cancelling the obligation other than by paying it (H), nor in D and E where the debt paid was not the debtor's alone (J).

Illustrations.

H.

I. A father held the note of his son for \$425. On the father's death his representatives sue on the note; but the son produces it cancelled. It appears that he had the means of access to his father's papers. There is no presumption that the note had been paid.⁶

In case I. it was said: "Is the production of this note by the defendant, under the facts of this case, evidence of

¹ French v. Price, 24 Pick. 21; Paine v. Dwinal, 53 Me. 53.

² Bancroft v. Holton, 59 N. H. 141 (1879).

³ Robeson v. Schuylkill Nav. Co., 3 Grant's Cas. 190 (1866).

⁴ Woods v. Woods, 127 Mass. 141 (1879).

⁵ Haines v. Pearce, 41 Md. 221 (1874); Peter v. Beverly, 10 Pet. 553 (1836).

⁶ Grey v. Grey, 47 N. Y. 553 (1872); Kenney v. Public Administrator, 2 Bradf. 219 (1853).

its discharge when it is proved not to have been paid or satisfied. I think it is not. Pothier, (*Obligations*, 73) says, that Boiseau holds that possession of the note affords a presumption of its payment; but if he allege a release he must prove it; for a release is a donation and a donation ought not to be presumed. Pothier differs and thinks it should be presumed unless the creditor shows the contrary. But Pothier agrees with Boiseau, that if the debtor was the general agent or clerk of the creditor having access to his papers, possession alone might not be a sufficient presumption of payment or release—so if he was a neighbor into whose house the effects of the creditor had been removed on account of a fire. The latter proposition seems applicable in this case. Here the case shows without contradiction that the defendant living at home with his father had a key that fitted his father's desk where the note was kept.

J.

I. A. was indebted to B. on a note made by himself and others. After the maturity of the note A. renders services to B. who pays him money therefor. In a suit on the note by B. there is no presumption that A. had paid it.¹

In case I. it was said, that as all the parties to the note were joint makers and equally bound, there could be no presumption that A. settled what was not exclusively his own debt.

RULE 77. — The presumption of payment is stronger than the presumption of continuance, but weaker than the presumption of innocence.

Illustrations.

I. An action is brought on an administrator's bond to compel him to account for and pay over the amount of a private debt due from him to the intestate. Twenty-four years have elapsed since the bond was given.

¹ *Mechanics' Bank v. Wright*, 53 Mo. 153 (1873)

There is no proof of a decree of distribution ordering him to pay to the heirs. Therefore the presumption of payment and the presumption of innocence (arising from the fact that he would have violated his duty in paying without a decree) conflict, and the latter must prevail.¹

In case I. it was said: "It has been further contended that the facts furnished a legal ground on which the jury might have presumed that the defendant had paid or accounted to the heirs of the intestate for the amount of the notes without the formality of any proceeding in the probate court by way of a settled account and a decree thereon, and that the judge should have left this question to the jury. The obvious reply to this objection and argument, is that the law does not presume that an administrator does wrong; it does not presume that the defendant did what by law he had no right to do, that is that he had made an unauthorized payment to the heirs under the circumstances mentioned. He was bound to account to the judge of probate, and he had no right to pay the heirs but under decree. To presume it would be to presume against law and right. We do not mean to say that had there been proof that the amount of the notes had been actually apportioned, and paid to the several heirs, though without a decree of the probate court, it might not, in a hearing in chancery, be a bar to an execution for any thing beyond nominal damages. It would be as strange to sanction the presumption where mentioned as that which was relied upon in another part of the argument to prove that the intestate had forgiven the debt due on the notes. Wrongs and gifts are not to be presumed; they must be proved."

¹ *Potter v. Titcomb*, 7 Me. 303 (1831).

CHAPTER XVI.

PRESUMPTIONS CONCERNING FOREIGN LAWS.

RULE 78.—Where in one State or country the law of another State or country is the subject of inquiry, the law of the forum will be presumed to be the law of the foreign State or country.¹

Illustrations.

I. An action is brought in New York on a policy of life insurance, which contained a forfeiture clause, "if the insured should die in the known violation of any law of any State or of the United States." The insured was killed in Louisiana while attempting to take the property of another by force to satisfy a debt. This being a violation of law by the common law of New York, the presumption is that it is so in Louisiana.²

¹ *McAnally v. O'Neal*, 56 Ala. 299 (1876); *Connor v. Trawick*, 37 Ala. 289 (1861); *Averett v. Thompson*, 15 Ala. 678 (1849); *Cox v. Morrow*, 14 Ark. 603 (1854); *Robinson v. Dauchy*, 3 Barb. 20 (1848); *Stokes v. Macken*, 63 Barb. 149 (1861); *Henthorn v. Doe*, 1 Blackf. 157 (1823); *Abell v. Douglas*, 4 Denio, 305 (1847); *Starr v. Peck*, 1 Hill, 370 (1841); *Crake v. Crake*, 18 Ind. 156 (1863); *Dalton v. Lusk*, 16 Mo. 111 (1853); *Henry v. Root*, 83 N. Y. 554 (1865); *Goodman v. Griffin*, 3 Stew. (Ala.) 160 (1830); *Re High*, 2 Doug. (Mich.) 515 (1847); *Holmes v. Mallett*, 1 Morris (Ia.), 83 (1840); *Dubois v. Mason*, 127 Mass. 37 (1879); *Warren v. Lusk*, 16 Mo. 111 (1853); *Davis v. Bowling*, 19 Mo. 651 (1854); *Hydrick v. Burke*, 30 Ark. 134 (1875); *Seaborn v. Henry*, 30 Ark. 469 (1875); *Hall v. Pillow*, 31 Ark. 32 (1876); *Buckinghouse v. Gregg*, 19 Ind. 401 (1863); *Schurman v. Marley*, 29 Ind. 459 (1866); *Rogers v. Zook*, 26 Ind. 237 (1862); *Haden v. Ivey*, 51 Ala. 381 (1874); *Oahalan v. Monroe*, 70 Ala. 271 (1861); *Evans v. Covington*, 70 Ala. 440 (1861); *Brown v. San Francisco Gas Co.*, 58 Cal. 426 (1881); *Alford v. Baker*, 53 Ind. 279 (1876); *Selma & R. Co. v. Lacy*, 43 Ga. 461 (1871); *Meyer v. McCabe*, 73 Mo. 236 (1880); *Holmes v. Broughton*, 10 Wend. 78 (1833); *Cressy v. Tatom*, 9 Oreg. 541 (1881). *McLear v. Hunsicker*, 29 La. Ann. 539 (1877), decides that an officer in another State will be presumed to have no greater powers than he has by the law of Louisiana. *Paine v. Noelke*, 43 N. Y. (S. C.) 176 (1878). The courts of Indiana will presume that a promissory note made payable in another State (e.g., Kentucky) is governed by the common law and not by the law merchant. *Alford v. Baker*, 53 Ind. 279 (1876). "Where a note is made and made payable in another State, and bears a higher rate of interest than is allowed by law in this, but suit is instituted upon it for collection, it is not necessary to plead any law of such State touching interest. The court presumes the common law to be in force in such other State of the United States, with perhaps an exception or two; that law established no rate of interest, and hence we presume the contract valid, according to existing law, when and where it is made." *Buckingham v. Gregg*, 19 Ind. 401 (1863); *Mendenhall v. Gately*, 18 Ind. 150 (1862).

² *Bradley v. Mutual Benefit Life Ins. Co.*, 3 Laus. 341 (1870).

II. An action is brought in Missouri on a sight bill of exchange drawn in New York. Days of grace upon such bills have been abolished by statute in Missouri. The presumption nevertheless is that in New York grace is still allowed as at common law.¹

III. A. brings an action in New York on a policy of insurance made in New Jersey on the life of B., in which he had no interest. A. can not recover, for such an insurance was invalid at common law, and will be presumed to be also invalid in New Jersey.²

IV. An action is brought in Massachusetts on a contract made by an attorney at law in New York, to conduct a litigation, in consideration of receiving ten per cent of the amount recovered. The presumption is that such a contract is void in New York.³

V. In an action brought in California on a judgment obtained in New York, interest is claimed. *Held*, that interest could not be recovered without showing that the law of New York allowed interest. The common law did not, and that law will be presumed to be in force in New York.⁴

VI. A will made in Georgia is before the courts of Alabama. The words, "surviving children," are to be construed. The construction given to these words by the decisions of the Alabama courts is presumed to be the construction which the words would receive in Georgia.⁵

VII. To a promissory note made in Kentucky and sued on in Illinois, the plea is made that there was a want of consideration. It is objected that the plea is bad in not alleging that want of consideration is a good defense to a note by the laws of Kentucky. The plea is held good as this will be presumed.⁶

VIII. A limitation over by deed after a life estate of personal property made in Virginia, is sought to be enforced in North Carolina. The attempt fails, for the presumption is that such a limitation is void in Virginia.⁷

IX. In an action in Alabama on a promissory note, the question arises whether a promissory note is negotiable in Georgia. Promissory notes being negotiable by the common law, the presumption is that it is.⁸

X. A married woman claims in the courts of Arkansas a sum of money derived from the sale of her property in Tennessee. At common law this

¹ *Lucas v. Ladew*, 26 Mo. 342 (1859).

² *Reese v. Mutual Benefit Ins. Co.*, 23 N. Y. 517 (1861).

³ *Tharston v. Percival*, 1 Pick. 415 (1833).

⁴ *Thompson v. Morrow*, 2 Cal. 99 (1862).

⁵ *Sharp v. Sharp*, 35 Ala. 574 (1860).

⁶ *Crouch v. Hall*, 15 Ill. 263 (1833).

⁷ *Griffin v. Custer*, 5 Ired. (Eq.) 413 (1848).

⁸ *Dunn v. Adams*, 1 Ala. 527; 35 Am. Dec. 43 (1860).

belonged to her husband. The presumption is that it is so in Tennessee and the married woman suing in Arkansas can not recover.¹

XI. The question in Kentucky is whether a note executed in Maryland is usurious by the laws of that State. There is no presumption that it is, but the statute must be proved.²

XII. A contract made in Pennsylvania is sued on in Kentucky, which at common law would be champertous. The presumption is that it is void in Pennsylvania.³

XIII. In Alabama, an action is brought by a sole distributee of the property of an intestate in Mississippi. At common law the title to the personal property of an intestate is cast upon his personal representative and not upon his next of kin. Such will be presumed the law in Mississippi.⁴

XIV. A marriage *de facto* is proved. The presumption is that it is according to the laws of the country where it took place.⁵

XV. A note made in Kansas on Sunday is sued on in Georgia. In Georgia, contracts made on Sunday are void. The presumption is that they are also void in Kansas.⁶

In case I. it was said: "In the absence of proof we are justified in presuming the law of Louisiana to be the same with the law of this State, and that whatever would be a violation of the law here, may for the purposes of this case be considered a violation of the law there. * * * That the act committed by the insured was a violation of the law, there can be no doubt."

In case IV. Parker, C. J., said: "It has been suggested that as the contract was made in reference to a suit pending in New York it is no breach of the laws of this State, for it may be that a similar contract would be good by the laws

¹ Hydrick v. Burke, 30 Ark. 124 (1875); Smith v. Peterson, 63 Ind. 243 (1873).

² Greenwade v. Greenwade, 3 Dana, 497 (1835); Forsyth v. Baxter, 3 Ill. 9 (1839).

³ Miles v. Collins, 1 Metc. (Ky.) 311 (1858).

⁴ Reese v. Harris, 37 Ala. 301 (1855).

⁵ Raynham v. Canton, 3 Pick. 233 (1825). In Com. v. Kinney, 120 Mass. 337 (1876) on an indictment for bigamy it was said: "The law of Ireland, being a foreign law, is matter of fact of which our courts have no judicial knowledge without proof; and no proof of it was introduced at the trial. A marriage solemnized by a priest and under which the parties have cohabitated as husband and wife, is *prima facie* a valid marriage everywhere." And see U. S. v. Jennegen, 4 Oranch C. C. 113 (1830); Hynes v. McDermott, 83 N. Y. 44 (1890).

⁶ Hill v. Wilker, 41 Ga. 449 (1871).

of New York, we having no evidence that there is any law of that State against champerty, or that such a contract as this would constitute the offense. But if maintenance or champerty is *malum in se* and an offense at common law it is to be presumed without any statute that the same law is in force there. * * * It certainly would be a violation of the comity due to a sister State to uphold a contract which would be void here merely because the mischief contemplated was to be executed there. As well might an action be maintained upon a promise, the consideration of which was the commission of an assault and battery in New York."

"As a general rule," it was said in case VII., "courts will not take judicial notice of the laws of another country, but they must be alleged and proved as facts. Especially is this the case as to statutes and local usages of such country. But the rule is not without qualification. In the absence of all proof to the contrary the common law is presumed to prevail in the States of the Union. On a common-law question the courts of one State will assume that the common law is in force in a sister State. By the common law a want of consideration is a good defense to a note in the hands of a payee or an indorsee after maturity. The presumption here being that the common law prevails in Kentucky the makers have a perfect defense to the note.

In case VIII. it was said: "By the common law such a limitation of a chattel by a deed is void; for the life estate consumes the entire interest. We presume the common law prevails in that State, until the contrary appears."

"There is no proof," it was said in case IX., "what the law of Georgia is, or whether there has been by statute any change of the common law which we judicially know obtains in all the States of the Union, and in the absence of such proof we will presume that the common law prevails. Though some doubt was at one time thrown over the ques-

tion by the scruples of Lord Holt, it is now generally conceded that promissory notes were negotiable at common law; such being the case, and presuming, as we must, that such is the law of the State of Georgia, the declaration which treats this note as an instrument negotiable by the law merchant is correct."

In case **XI.** it was said: "Each State has its own peculiar statutes on the subject of interest as well as usury. In some of the States a greater rate of interest may be reserved by special contract on the loan of money than is collectible on ordinary bonds or notes, and in others a much higher rate of interest may legally be reserved than is sanctioned by the laws of Kentucky; and in others there are no prohibitory statutes against usury. What may be the legal rate of interest in Maryland, and whether any, and if any, what laws existed in said State against usury at the time when said contract was made, this court can not judicially know. These are facts to be averred and proven like other facts. And as in this case they are neither averred nor attempted to be proven, this court are not warranted in concluding that the note was executed as a contract for a loan of money in violation of any law of said State."

In case **XII.** it was said: "The court will presume, until the contrary is alleged and proved, that the common law is yet in force in the State of Pennsylvania. The plaintiff, in attempting to manifest his right to a part of the judgment, exhibits a contract void by the common law. * * * It is possible that the common law has been altered in Pennsylvania by statute, and that the contract under which the plaintiff claimed was not void. We find in the record a deposition tending to show that this is true. If it be true that such change has been made by statute, the fact should have been stated in the petition and then proved."

In case **XV.** it was said: "The main and controlling question made by the record is whether a note executed on

the Sabbath day, and given in the business or work of the parties' ordinary calling, and not in pursuance of works of necessity or charity, is such a contract as may be enforced under the laws of this State. There is nothing disclosed by this record relative to the laws of Kansas on this subject, and the principle of *lex loci*, or the doctrine of comity, as to how far Georgia would permit contracts violative of her public policy to be enforced, conceding such contracts to be valid outside her territorial limits where made, but conflicting with her own system of laws and public policy, is a question we need not decide, as there is nothing in this record which would authorize this court to presume such law or statutory provision to exist. Sitting as we do to administer the laws of this State in questions to be determined by our courts, we are necessarily governed by the laws as we find them existing here, except proof is made of different provisions of law existing when the contract sought to be enforced was executed. As a general rule the laws of the place when proved, *lex loci contractus*, will be administered by courts wherever the enforcement of the contract is invoked. But to this general rule there are exceptions; for courts will not lend their processes or powers to enforce laws which contravene the public policy, or are immoral, or in conflict with the fundamental principles of conscience, or morality pervading the Legislature of the State when the power of such court is invoked; and this court, while it broadly, and in the widest sense, recognizes comity upon all questions within its legitimate scope and operation, has, nevertheless, asserted in its prerogatives of justice these exceptions to the general rule. In this case, however, the question is what construction courts will give to the law of contracts, where there is no proof of the *lex loci*? And we hold, in the absence of proof to the contrary, the legal presumption is that the *lex loci* is the same as our own. We are sustained in this presumption by the fact that a contrary view would suppose the people of Kansas to

have annulled the decalogue, and to have permitted by law the disregard of Christian obligation, and not only forgotten, but violated the injunction, "Remember the Sabbath day to keep it holy; on it thou shalt do no manner of work." This State for over a century has recognized upon her statutes the sanctity of the obligation, and punished its violation. All worldly labor or work done in the ordinary calling of our people on the Lord's day is forbidden under penalties, and only such acts as necessity invokes or charity inspires are exempted from their infliction. This court in the thirty-first *Georgia*¹ has expressly ruled that the payment of money on a note was a transaction in violation of the law, it being made on the Lord's day or Sunday, and did not constitute such an acknowledgment of the debt as would raise the presumption of a promise sufficient to take the case out of the Statute of Limitations; that the act of payment was void, and all the obligations growing out of it were null and void. And this is the almost unbroken current of American authority. 'A promissory note given on a Sunday is void as between the parties, and subsequent promise to pay it will not make it valid.'² 'A note signed and delivered on Sunday is invalid.'³ 'A note given on Sunday for the price of a horse sold on that day is void.'⁴ And the same doctrine is laid down in the following cases: 38 Mississippi, 344; 16 Iowa, 49; 9 Minnesota, 194; 8 Minnesota, 18 and 41; 9 New Hampshire, 500; 14 New Hampshire, 233; 41 New Hampshire, 215; 4 Indiana, 619; 13 Indiana, 565; 1 Hunt's Cases (Tennessee), 261; 3 Wisconsin, 343; 5 Alabama, 467; 10 Alabama, 566; 18 Alabama, 280; 25 Alabama, 528; 27 Alabama, 281; 18 Vermont, 379; 24 Vermont, 318; Michigan Reports, 2 Douglass, 73. And we might expand, if we had time, this cloud of authority in support of a doctrine almost without exception, and those rather in modification of the rule than

¹ p. 607.² *Pope v. Lynn*, 50 Me. 83.³ 48 Me. 198.⁴ 26 Me. 464.

in conflict with it. Grouping, however, this mass of authority from every section of this continent, we think it would be unjust to the Christian civilization of this age to permit any other presumption than the one we have laid down, to wit: that, in the absence of proof of any law to the contrary, the presumption is that the law of this contract must be held to be the same as our own. And as our courts have held all contracts made in the pursuance of the ordinary callings or business on the Lord's day or Christian Sabbath, to be void, it follows that this court so adjudges in the case at bar, and the judgment of court below is, on this ground, reversed."

RULE 79. — Acts which are criminal by the law of the forum and are *malum in se*, will be presumed to be crimes in a foreign state or country.

Illustrations.

I. The question is in Massachusetts whether an assault on the person is a crime in Louisiana. The presumption is that it is.¹

II. A. is proved to have robbed B. while in France, and to have killed C. while in England. The question arising in a proceeding in the courts of an American State, the presumption is that these acts were crimes by the laws of France and England respectively.²

III. In the course of a proceeding in the courts of an American State, the question arises whether C., who sold goods on Sunday in England, and D., who sold liquor in Scotland without a license, have been guilty of criminal acts. The American courts will refuse to presume that they have.³

Robbery, larceny and assaults upon the person which are criminal offenses by the common law, and the laws of all civilized countries, will in one State be presumed to be crimes in another.⁴

¹ *Cluff v. Mutual Benefit Life Ins. Co.*, 13 Allen, 306 (1866).

² *Id.*

³ *Id.*

⁴ *Cluff v. Mutual Benefit Life Ins. Co.*, 13 Allen, 306 (1866).

RULE 80.—The term “another state or country” within Rule 78 does not (in the United States) include a state or country which has never been subject to the common law of England (A) or a tribe or nation uncivilized (B).

Illustrations.

A.

I. An action is brought in Missouri to recover damages for breach of a parol promise made in Texas to accept certain drafts. Such a promise was valid at common law, but is not enforceable under the Missouri statute. The court can not presume that the common law is in force in Texas, and the plaintiff fails.¹

II. In a dispute concerning property in the New York courts, the law of Russia as to husband and wife is in question. There is no presumption that the common law of New York on this question prevails in Russia.²

III. The question arises in California as to what is the law in Texas on a certain point. There is no presumption that the rule on the point in Texas is the rule of the common law.³

In case I. it was said: “Counsel for the plaintiff ask us to presume, in the absence of evidence, that the common law is in force in Texas. The presumption can only be indulged with reference to those States which, prior to becoming members of the Union, were subject to the laws of England. Texas was a part of the Spanish possessions on this continent, and if the common law ever prevailed there or now prevails there it must be by virtue of some statutory provision of which we can not take judicial notice.”

In case III. it was said: “The will must be interpreted according to the law of Texas, where it was made and

¹ *State v. Mulhall*, 72 Mo. 522 (1880).

² *Savage v. O'Neill*, 44 N. Y. 298 (1871), overruling *Savage v. O'Neill*, 42 Barb. 374 (1864). And see *Owen v. Boyle*, 15 Me. 147 (1838); 33 Am. Dec. 143.

³ *Norris v. Harris*, 15 Cal. 296 (1860).

where the property upon which it operated was situated. To that law we must resort to determine the capacity of the testator, the extent of his power of disposition, and the conditions upon which the power of alienation vested in the guardian was to be exercised.¹ In the present case there is no proof what the law of Texas is upon these subjects. One of the counsel of the defendants insists that, in the absence of such proof, the rule is to presume the existence of the common law and to be governed by its principles. There is no doubt that the common law is the basis of the laws of those States which were originally colonies of England, or carved out of such colonies. It was imported by the colonists and established so far as it was applicable to these institutions and circumstances, and was claimed by the Congress of the United Colonies in 1774 as a branch of these 'indubitable rights and liberties to which the respective colonies' were entitled.² In all the States thus having a common origin, formed from colonies which constituted a part of the same empire, and which recognized the common law as the source of their jurisprudence, it must be presumed that such common law exists—it has been so held in repeated instances—and it rests upon parties who assert a different rule to show that matter by proof.³ A similar presumption must prevail as to the existence of the common law in those States which have been established in territory acquired since the Revolution; when such territory was not at the time of its acquisition occupied by an organized and civilized community; where, in fact, the population of the new State upon the establishment of government was formed by emigration from the original States. As in British colonies, established in uncultivated regions by emigration from the parent country, the subjects are considered as carrying with them the

¹ Jarman on Wills, 1; 2 Greenl. on Ev., sec. 671.

² 1 Kent's Comm. 243.

³ See *Inge v. Murphy*, 10 Ala. 895.

common law, so far as it is applicable to their new position, so, when American citizens emigrate into territory which is unoccupied by civilized man, and commence the formation of a new government, they are equally considered as carrying with them so much of the common law, in its modified and improved condition under the influence of modern civilization and republican principles, as is suited to their new condition and wants. But no such presumption can apply to States in which a government already existed at the time of their accession to the country as Florida, Louisiana, and Texas. They had already laws of their own, which remained in force until by the proper authority they were abrogated and new laws were promulgated. With them there is no more presumption of the existence of the common law than of any other law. They were independent of the English law in their origin, and hence no presumption of the common law of England can be indulged. In countries conquered and ceded to England, the common law has no authority without positive enactment, and for the same reason that they were not part of the mother country, but distinct dominions.¹ As Texas was an independent country at the time of its accession to the United States, having laws of its own, not being carved out of the ancient colonial provinces of England, like the original thirteen States, or formed by emigration into an uncultivated country from those States, but from a Mexican province by a successful revolution against the Republic of Mexico — no presumption can arise of the existence therein of the common law, which is the basis of the jurisprudence of the other States.”

In a New York case,² Kent, C. J., said: “The court can not know *ex officio* what are the rights and disabilities of infants, or when infancy ceases by the provincial law of Jamaica. These questions depend much upon municipal

¹ 1 Black. 107; 1 Story on the Cons. 150.

² Thompson v. Ketcham, 8 Johns. 190 (1811).

regulation; and what the foreign law is must be proved as a matter of fact."¹

B.

I. A person acting in the Creek Nation of Indians as an administrator claims in Arkansas to have sold certain property under such power. The court will not presume that the common law in this respect is the law of the Creeks.²

"If this had been an administration in a sister State," it was said in case I., "in the absence of the statute laws of the State, we should hold, as we repeatedly have, that the common law was in force under which the powers and duties of the administrator would be determined. * * * But we are not prepared to say that we will presume the existence of the common law in a semi-civilized nation of Indians, acting under usages and customs of their own."

RULE 81. — When one State or country adopts a statute of another State or country which has received a judicial construction in that country, such construction is presumed to have been adopted with the statute.

*

Illustrations.

I. An English statute³ relating to gaming had been construed by the English courts to include horse racing under the words "other games." The State of Illinois subsequently adopts this statute. The presumption in the Illinois courts is that this construction was adopted with the statute.

¹ In *Mostyn v. Fabrigas*, Cowp. 174 (1774), Lord Mansfield said: "But it is objected that supposing the defendant to have acted as the Spanish Governor was empowered to do before, how is it to be known here that by the laws and constitution of Spain, he was authorized so to act. The way of knowing foreign laws is by admitting them to be proved as facts, and the court must assist the jury in ascertaining what the law is. For instance, if there is a French settlement, the construction of which depends upon the custom of Paris, witnesses must be received to explain what the customs is as evidence is received of customs in respect to trade. So in the supreme resort before the king in council, the Privy Council determines all cases that arise in the plantations, in Gibraltar, or Morocco, or Jersey or Guernsey, and they inform themselves by having the law stated to them." And see *Male v. Roberts*, 8 Esp. 163 (1802).

² *Du Val v. Marshall*, 30 Ark. 280 (1875).

³ 9 Anne, c. 14.

⁴ *Tatman v. Strader*, 23 Ill. 428 (1860); see, *Shoreshire v. Glascock*, 4 Mo. 538.

RULE 82.—The term “law” within Rule 78 is restricted to the common law of the forum, or the commercial law (A) and does not include the statute law of the forum¹ (B).

Illustrations.

A.

I. An action is brought in Massachusetts to recover a payment of freight made in advance to an owner of a ship for freight. The charter party was made in Scotland. The common law of England is that a payment of freight in advance can not be recovered back. The common law of Massachusetts is different. The presumption is that the law of Scotland is like that of Massachusetts.²

“The charter party in the case before us,” it was said in case I., “was made in Scotland, and is therefore a contract to be governed by the law of Scotland, if that law differs from the law of Massachusetts, and not of the law of this

¹ Donegan v. Wood, 49 Ala. 242 (1873); Kinney v. Hosea, 3 Harr. (Del.) 77 (1840); Baughan v. Graham, 1 How. (Miss.) 220 (1835); State v. Twitty, 2 Hawks, 441 (1823); Mason v. Wash, Breese, 16 (1822); Johnson v. Chambers, 13 Ind. 102 (1850); Davis v. Rogers, 14 Ind. 424 (1860); Wakeman v. Marquand, 5 Mart. (N. S.) 270 (1826); Walker v. Maxwell, 1 Mass. 103 (1804); Legg v. Legg, 8 Mass. 99 (1811); Harper v. Hampton, 1 Harr. & J. 623 (1805); Gordon v. Ward, 16 Mich. 263 (1868); Kermott v. Ayer, 1 Mich. 181 (1863); Crane v. Hardy, 1 Mich. 56 (1848); Leak v. Elliott, 4 Mo. 450 (1836); Hite v. Lenbert, 7 Mo. 22 (1841); Wilson v. Cockrill, 8 Mo. 7 (1843); Seymour v. Sturgess, 26 N. Y. 135 (1862); McCulloch v. Norwood, 58 N. Y. 567 (1874); Chapin v. Dobson, 78 N. Y. 74 (1873); Locke v. Huling, 24 Tex. 311 (1859); Territt v. Woodruff, 19 Vt. 183 (1847); Lincoln v. Battelle, 6 Wend. 476 (1831); Chanouie v. Fowler, 3 Wend. 173 (1829); Holmes v. Brighton, 10 Wend. 75 (1833); Hull v. Augustine, 23 Wis. 338 (1866); Walsh v. Dart, 13 Wis. 635 (1860); Kenyon v. Smith, 24 Ind. 11 (1865); People v. Lambert, 5 Mich. 356 (1858); Ramsey v. McCauley, 2 Tex. 190 (1849); Spawn v. Crummerford, 20 Tex. 216 (1857). Some cases seem to hold a different doctrine. Hickman v. Alpaugh, 21 Cal. 228 (1862); Hill v. Grigsby, 33 Cal. 55 (1867); Martin v. Hazard Powder Co., 2 Col. 597 (1875); Smith v. Smith, 19 Gratt. 545 (1869); Allen v. Watson, 2 Hill (S. C.), 319 (1834); Bean v. Briggs, 4 Iowa, 464 (1857); Crafts v. Clark, 38 Iowa, 237 (1874); Harris v. Allnutt, 12 La. 465 (1838); Atkinson v. Atkinson, 15 La. Ann. 491 (1860); Conally v. Riley, 25 Md. 402 (1866); Harper v. Harper, 1 H. & McH. 687; Gardner v. Lewis, 7 Gill, 377; Campbell v. Miller, 3 Mart. (N. S.) 149 (1824); Smoot v. Baldwin, 1 Mart. (N. S.) 523 (1823); Brimhall v. Van Campen, 8 Minn. 13 (1862); Crozier v. Hodge, 3 La. 358 (1832); Monroe v. Douglass, 5 N. Y. 452 (1851); Messner v. Lewis, 20 Tex. 219 (1857); Green v. Rugly, 23 Tex. 539 (1859); Rape v. Heaton, 9 Wis. 338 (1859); Sadler v. Anderson, 17 Tex. 245 (1856); Cannon v. North Western Ins. Co., 29 Hun, 470 (1883); Rogear v. Hatch, 3 Nev. 25 (1872); Marsters v. Lash, 61 Cal. 623 (1882). As to interest on money. Cooper v. Reaney, 4 Minn. 528 (1860); Desnoyer v. McDonald, 4 Minn. 515 (1860). The matter is regulated by statute in Kentucky. Thomas v. Beekman, 1 B. Mon. 34 (1840).

² Chase v. Alliance Ins. Co. 9 Allen, 311 (1864).

commonwealth. We do not find that the precise point has ever been expressly adjudicated by any Scottish court, nor has any case been cited which is a direct authority in point. The defendants have relied in argument upon a series of English decisions which are more or less at variance with the decisions of this court upon the subject, and upon citations of Scotch authorities to show that the mercantile law of Scotland is generally the same with that of England. But while we can have no doubt that the decisions of English courts would be regarded as of the highest authority by any Scotch tribunal upon a question of commercial law, we do not find that these decisions are binding upon the courts of Scotland. The question is not one of local jurisprudence but of the construction and effect of a commercial contract on which the rule adopted by any local tribunal if it seems erroneous upon general principles, must be confined to the jurisdiction within which it is made.¹ The general doctrine of the English cases, although they do not seem to be wholly constituent or founded on any clear and uniform principle, appears to be that a payment of freight in advance can not be recovered back, unless it is made to appear affirmatively that it was intended by the parties merely as a loan. But as we do not regard these decisions as correct in principle, we must treat them as indicating a local peculiarity of English law, which is not to be extended beyond the jurisdiction in which it is shown to have been adopted. It appears to us inconsistent not only with sound principles of construction in the interpretation of the contract to which it applies, but also irreconcilable with the general principles relating to affreightment which have been recognized by the judges and approved text writers of Scotland."

In *State v. Cobb*² it was said: "The bonds indorsed by the State being made payable in Boston where, as we must presume, the commercial law is unaffected by legislation,"

¹ *Wood v. Cori*, 4 Metc. 203; *Cribbs v. Adams*, 13 Gray, 507.

² 64 Ala. 157 (1879).

etc. In an Illinois case the court say: "If it had appeared upon its face, or had been shown by evidence that the contract was made in another State or country, in the absence of proof to the contrary we must presume that there were laws in that country regulating trade, commerce, and the buying and selling of property, and that a sale may be made upon credit, and notes given by purchasers, and that they were sanctioned by the local law."¹ In a number of cases it has been held that in commercial transactions the law of another State is presumed to be the same as the law of the forum.² Thus, in every State the presumption is that in every other State three days grace is allowed on bills of exchange and promissory notes.³ In *Dollfus v. Froesch*,⁴ it was held that the law of New York as to days of grace on commercial paper would be presumed to be the law in France.

B.

I. In a New York court a declaration of trust executed in Michigan is sought to be enforced. Such trusts are enforceable in New York by the provisions of a statute. There is no presumption that such statute is in force in Michigan.⁵

II. In New York it is contended that a certain contract, void for usury in New York is also void in Vermont where it was made. There is no presumption that the statute concerning usury has been enacted in Vermont.⁶

III. In an action brought in New York, on a contract made in Pennsylvania, the plea was that it was void because not in writing. The presumption is that no writing was required in Pennsylvania, as none was necessary at common law.⁷

IV. A parol contract to sell lands made in Illinois is sought to be enforced in Michigan. It is objected that to be valid it should be in

¹ *Smith v. Whitaker*, 23 Ill. 367 (1860).

² *Bemis v. McKenzie*, 13 Fla. 553 (1870); *Leavenworth v. Brockway*, 2 Hill, 201 (1842); *Cribbes v. Adams*, 13 Gray, 597 (1859).

³ *Wood v. Carl*, 4 Meta. 203 (1842).

⁴ 1 Denio, 367 (1845).

⁵ *Throop v. Hatch*, 3 Abb. Pr. 27 (1856); *Forbes v. Scannell*, 13 Cal. 378 (1859).

⁶ *Pomeroy v. Ainsworth*, 23 Barb. 118 (1856); *City Savings Bank v. Bidwell*, 29 Barb. 325 (1859); *McCraney v. Alden*, 46 Barb. 274 (1866).

⁷ *White v. Knapp*, 47 Barb. 549 (1867); *Houghtaling v. Ball*, 19 Mo. 84 (1853).

writing. The presumption is that the laws of Illinois do not require this.¹

V. A. sues B. in Missouri for slander in saying that he had to leave Indiana for "burning a barn." There is no presumption that "burning a barn" was a crime in Indiana, and this not being proved the action will not lie.²

VI. An action is brought in New York for damages (given by statute in that State) resulting from a death caused by negligence of a railroad on the Isthmus of Panama in the Republic of New Grenada. The action will not lie, for there is no presumption that such an amendment to the common law is in force in New Grenada.³

VII. An action is brought in New York on a note made in Florida. The defense is usury. It appears that by the laws of New York a contract reserving more than seven per cent is usurious, and the note bears eight per cent. The presumption is that it is valid in Florida.⁴

VIII. A note made payable in New York was sued on in Massachusetts. It was proved to have been made on Sunday. There is no presumption that a statute like that of Massachusetts is in force in New York, and the note is valid.⁵

In case I. it was said: "Do the statutes of this State or does the common law as it existed in the absence of any legislation or at the time of the separation of this country from England, prevail in other States of the Union by presumption of law. There is a want of precision in the language of some of the cases which would lead us to suppose upon a cursory examination that our courts have intended to decide that in the absence of any evidence of what the laws of other States are, it will be presumed that they are the same as the laws of this State, without distinguishing whether the common law or a statute of the State should give the rule. It will be conceded that our statutes have no extra-territorial force, and as they can not have as the statutes of this State any binding force out of this State, the presumption must of necessity be that the other States of the Union did at the same time that we acted upon the

¹ *Ellis v. Maxon*, 19 Mich. 186 (1869).

² *Bundy v. Hart*, 46 Mo. 462 (1870).

³ *Whitford v. Panama R. Co.*, 23 N. Y. 465 (1861).

⁴ *Cutler v. Wright*, 22 N. Y. 472 (1860).

⁵ *Murphy v. Collins*, 121 Mass. 6 (1876).

subject make the same changes in the law which we did, if we come to the conclusion that the statute laws of all the States are presumed to be the same as our own. This would be a presumption violent in the extreme as a presumption of fact and should not be entertained except upon the clearest authority. It is well established that the common law is presumed to have originally existed in the states of the Union except perhaps in those which had before becoming members of the Union been subject to another code and system of laws, and it is a well established presumption of law that things once proved to have existed in a particular condition, continue in the condition until the contrary is established by evidence either direct or presumptive. Each State having the sole power to legislate for itself and change the common law therein by act of the Legislature it would seem to follow that until there were some proof that the common law had by legislation ceased to be the law of the land it would be presumed to be in force. I see no foundation for the presumption that because one State has seen fit to dispense with the rules of the common law and provide others for the government of its citizens upon a given subject, the Legislature of every other State has been like minded. I speak now of those matters which are known to, and in the absence of an overruling statute are governed by, the common law. There are matters in relation to which the common law does not speak, which are regulated solely by statute, and in regard to some of these matters it is not impossible that our statute may be presumed to be the same as those of the other States or rather the laws of other States, in the absence of evidence, presumed to be the same as those of our own."

And in a case very like case I., but decided one year later,¹ it was said: "The true rule assumes to be founded on a probability that it will lead to the actual truth, and is

¹ Wright v. DeLafield, 23 Barb. 496 (1857).

not a technical rule forced upon courts against their conviction of what is right. Until the contrary is proved it is more likely to be true than false that the laws of another State are the same as ours, as to contracts relating to personal estate and as to commercial matters particularly ; and that when the common law is known to prevail, it is construed there as it is with us, whether relating to lands or personal property. So, also, interest is now considered as much an incident to a loan of money as rent is to the letting of a house or lands. It is, therefore, an assumption most compatible with truth that interest at some rate is allowed in every State. Although the rate of interest therefore is fixed by statute, yet as *some* rate is universal, our courts must allow some rate ; and if the parties furnish no better guide to the truth, the court assumes ours to be the legal interest in computing the amount to be recovered. But when we introduce what we know to be a new law (as is our statute) respecting trusts, it would be a perversion of reason to pretend to infer that as soon as we placed the new law on our statute book every other State in the Union would adopt the same law. Slavery was abolished here in 1826. It would be a bold proposition that we should infer that it was thenceforth abolished in all the other States in which it was proved to have previously existed. Within the present century we have adopted laws giving priority to conveyances of lands according to the order of time in which they are recorded ; creating liens in favor of mechanics ; at one time making banking a monopoly, afterwards opening it to all under certain restrictions. Many of the States have by express statute adopted similar laws. He would be a very unwise man who, inferring that our sister States had conformed their laws to ours, should make his investments accordingly. And it would be no less unwise and unjust in a court to make the same inference and on it to determine the rights of parties. Any conclusion which shocks reason and common sense can not be founded on correct rules of evidence."

In case III. it was said: "Assuming that the contract is void in consequence of not being in writing, it is so by reason of the statute of frauds of this State. By the common law it was a valid contract, and there is no evidence that by any statute of the State of Pennsylvania such a contract was required to be evidenced by writing. We are not at liberty to indulge in any presumption as to what the legislation of another State or country has been or what statutes it may have enacted. To presume that the statute law of another State is the same as that of our own, would be, as it seems to me, the height of absurdity. In a given case the statutes may be and they may not be similar to ours. If they are and a party wishes to avail himself of them in the courts of this State, it is a very easy thing to prove it. That we have a particular statute containing particular provisions is not any evidence, not even *prima facie*, that another State has a statute with like provisions. Were it otherwise it would follow that we are bound to presume that every one of our sister States has enacted all the general laws contained in our massive tomes of session laws; and by the same rule the courts of each State would be bound to presume the same thing in regard to the statutes of each of the other States. The rule, as I have always understood it to exist in this State, is that where there is no evidence to the contrary it will be presumed that the common law is in force in each of the other States, except possibly the State of Louisiana, and that no such presumption will prevail in regard to statute or written law. If the common law has been abrogated, changed, or modified by a statute of another State it must be proved."

In case IV. it was said: "A parol contract to sell lands was good at common law. It is only made void by statute. If we should make any presumption in the absence of evidence, as to the provisions of any foreign laws, it would be that they conform in substance to the general principles of the common law. How universally we could make such a presumption it is not necessary to consider. We certainly

can not presume that the Legislature of another State has adopted all of our statutes, and therefore, we must have proof before we can know that they have passed any statute."

In case V. it was said: "It may be said that the courts of each State should assume all acts to be criminal in other States that are made so by the statutes of their own State, but this would be an assumption not only contrary to the traditions and practice of courts, but contrary also to the known fact; and if it be also said that burning a barn is a crime of such moral turpitude that we should assume it to be a punishable offense, that must depend upon circumstances. If the charge involve such a burning as to make it by our statute arson in the first or second degree, the remark would apply, for that would be a crime at common law, and no foreign statute need be alleged or proved. But many of our Western barns are in the open field and of trifling value, some being built of poles and straw; and their destruction would involve less of the moral elements of crime than some mere trespasses."

In case VI. it was said: "The courts do not in general take notice of the laws of a foreign country, except so far as they are made to appear by proof. In the absence, however, of positive evidence as to the law of another country, our laws indulge in certain presumptions. *Prima facie*, a man is entitled to personal freedom and the absence of bodily restraint, and to be exempt from physical violence to his person everywhere. Hence, if one bring a civil action for false imprisonment, or for an assault and battery committed abroad, he need not in the first instance, offer any proof that such acts are unlawful and entitle the injured party to a recompense in damages in the place where they were inflicted; for the courts will not presume the existence of a state of law in any country by which compensation is not provided for such injuries. And where the condition of the law of another State becomes material, and

no evidence has been offered concerning it, our courts will presume that the general principles of the common law which we always consider to be consonant to reason and natural justice prevail there. But no such presumption prevails respecting the positive statute law of the State. There is generally no probability in point of fact, and there is never any presumption of law that other States or countries have established precisely or substantially the same arbitrary rules which the domestic Legislature has seen fit to enact. In applying these remarks to the present case, we are brought to the conclusion that the statutes under which this action is instituted do not, so far as we know or can assume, form any portion of the law of New Granada where the facts constituting the supposed cause of action occurred. These statutes have introduced a principle wholly unknown to the common law, namely, that the value of a man's life to his wife or next of kin, constitutes with a certain limitation as to amount, a part of his estate, which he leaves behind him to be administered by his personal representatives. The contrary doctrine, to wit, that a cause of action existing for such a wrong in favor of the party injured dies with him, and forms no part of the succession to which his wife and kindred are entitled, was so well established as to form one of the standing maxims of the law."

In case VII. it was said: "As the rate of interest inserted in the note exceeds the rate allowed in this State, the defendant's counsel insists that the note is *prima facie* usurious. He relies upon the ordinary presumption that the laws of a foreign State, nothing being shown to the contrary, corresponds with our own, and claims that it was incumbent upon the plaintiff to repel this presumption by proof that the law of Florida allowed interest at the rate mentioned in the note. I doubt whether the presumption relied upon extends to a case of this kind. Our statute of usury is highly penal. It forfeits the entire debt. At

common law the contract would be perfectly good. We are not, I think, called upon to presume that foreign States have adopted all our penal legislation."

"The contract," it was said in case VIII., "was not void by the common law, and there is no presumption that the law of another State corresponds with a statute of this common wealth."

"In the absence of any proof to the contrary, we must presume that [the English common law] without any modifications other than such as was "produced by our Revolution and by our political institutions in general, still prevail in (another) State. Such modifications as may have been made by her legislative acts, can not be judicially known to us and must be shown by proof."¹

RULE 83.—And a rule of the common law to which exceptions have been made by the courts will not be presumed to be in force intact in the foreign State or country.

Illustration.

I. An action was brought in Maine by A. against B. for a quantity of salt placed in a store in New Brunswick. It appeared that the salt had been seized for rent. The court will not presume that all property in New Brunswick, placed on the land of another is liable to be taken for rent in arrear.²

In case I. it was said that the courts of this State could not presume that a rule of the common law to which so many exceptions had been made in favor of trade and commerce, was in force in its original vigor in another country. "There are many and important exceptions to the general law of distress, made in favor of trade and commerce. In a case in which the whole doctrine was much examined, it was decided that goods of the principal in the hands of his

¹ *Newton v. Cocks*, 10 Ark. 169 (1849).

² *Owen v. Bogle*, 15 Me. 147; 33 Am. Dec. 143 (1838); *Smith v. Gould*, 4 Moore P. O. 26 (1842).

factor were not liable to be distrained for the factor's rent.¹ For like reasons it has been held that property deposited for a broker in a warehouse upon a wharf for safe custody to wait an opportunity to sell, was not liable to be distrained for rent due from the wharfinger.² And the same rule of exemption has been decided to apply to goods in a common warehouse.³ This is not the proper occasion to examine into the extent of the exception in favor of trade and commerce, further than to show that it may be important to a just decision of the rights of these parties that the law should be proved by those who are competent to speak with a full knowledge of it."

¹ *Gilman v. Eaton*, 3 Brod. & B. 75.

² *Thompson v. Mashiter*, 1 Bing. 283.

³ *Mathias v. Meenard*, 2 C. & P. 353.

CHAPTER XVII.

THE PRESUMPTIONS FROM THE ALTERATION OF INSTRUMENTS.

RULE 84. — Alterations, erasures and interlineations appearing on the face of writings, whether under seal or not, are presumed to have been made before their execution or completion.¹

Illustrations.

I. A deed is produced by the grantee. There is an erasure in the description clause and another in the covenants. The erasures are presumed to have been made by the parties or the scrivener before the deed was executed and delivered.²

II. A will is produced for probate. There is an alteration in the name of one of the legatees. It is presumed that this was made before it was signed.³

III. B. sues C. on a promissory note made by C. There is an alteration and erasure in the amount payable. These are presumed to have been made before it was signed.⁴

¹ *Cumberland Bank v. Hall*, 6 N. J. L. 215 (1833); *Commissioners v. Hanion*, 1 N. & McC. 554 (1819); *Rankin v. Blackwell*, 2 Johns. Cas. 198 (1801); *Rannion v. Crane*, 4 Blackf. 466 (1838); *Commercial Bank v. Lum*, 7 How. (Miss.) 414 (1843); *Reed v. Kemp*, 16 Ill. 445 (1855); *Jouden v. Boyce*, 33 Mich. 302 (1876); *Stevens v. Martin*, 18 Pa. St. 101 (1851); *Little v. Herndon*, 10 Wall. 31 (1869); *Malarin v. United States*, 1 Id. 288 (1863); *Smith v. United States*, 2 Id. 233 (1864); *Ramsay v. McCue*, 21 Gratt. 349 (1871); *Matthews v. Coalter*, 9 Mo. 705 (1846); *McCormick v. Fitzmorris*, 39 Id. 24 (1866); *Acker v. Ledyard*, 8 Barb. 514 (1850); *Gooch v. Bryant*, 13 Me 365 (1836); *Crabtree v. Clark*, 20 Me. 337 (1841); *Clark v. Rogers*, 2 Id. 147 (1832); *Wickes v. Caulk*, 5 H. & J. 41 (1830); *Miliken v. Martin*, 66 Ill. 13 (1872); *Putnam v. Clark*, 27 N. J. (Eq.) 412 (1878); *Wikoff's Appeal*, 15 Pa. St. 218 (1850); *Ely v. Ely*, 6 Gray, 439 (1856). In Louisiana erasures and interlineations are presumed to be false or forged, and must be accounted for by the party setting up the instrument. *McMicken v. Beauchamp*, 2 La. 290 (1831); *Pipes v. Hardesty*, 9 La. Ann. 153 (1854). An impossible date raises a presumption of ante or post dating — not of alteration. *Davis v. Loftin*, 6 Tex. 490 (1851).

² Cases cited in last note.

³ *Id.*; *Graham v. O'Fallon*, 4 Mo. 607 (1837).

⁴ *Id.*

IV. On the face of an assessment an erasure appears. The presumption is that this was made before it was signed.¹

V. There is an alteration in the minute book of a corporation. The presumption is that it was made before the book was signed.²

VI. There is an alteration in the return made by an officer, it appearing to have been first written that a notice had been posted in two public places, the word "two" being altered to "the" in the same hand and ink. The presumption is that this alteration was made before the signing of the return.³

VII. A blank in a note was found to have existed at its delivery and to have been subsequently filled. The presumption is that it was filled by a person having the legal custody of it.⁴

VIII. An action is brought on a contract to indemnify A. on certain notes made on March 16th. The contract is also dated March 16th, but when produced it is seen that the figures "16" describing the notes have been written over the figures "15," and in the date of the instrument the figures "16" have been written over the figures "17." The presumption is that these alterations were made at the time of its execution and the contract is admissible.

In the early history of the common law the judges examined the question themselves, and if the deed or other instrument appeared to be interlined they refused to admit it. Subsequently this practice was altered, and the question whether the alteration was made before or after the delivery of the deed was left to the jury. And finally the presumption of law was raised that the alteration had been made before the delivery, on the ground that any other view would be a presumption in favor of fraud and forgery.⁵ In the United States the rule, except in one State, seems to be well established that the presumption will be in favor of the validity of the instrument. In a Georgia

¹ *North River Meadow Co. v. Shrewsbury Church*, 22 N. J. L. 427 (1850).

² *Stevens Hospital v. Dyas*, 15 Ir. Eq. (N. S.) 405 (1863).

³ *Boothby v. Stanley*, 34 Me. 515 (1852). "Fraud," said the court, "can not be presumed unless the ordinary rules of presumption of honesty and innocence be disregarded. The alteration of any legal instrument in the absence of proof or satisfactory explanation to the contrary, should be presumed to have been made simultaneously with the instrument or before its execution."

⁴ *Inglish v. Breneman*, 9 Ark. 122; 47 Am. Dec. 735 (1848).

⁵ *Beaman v. Russell*, 20 Vt. 205; 49 Am. Dec. 775 (1848).

⁶ *Tatum v. Catamore*, 16 Q. B. 745 (1851).

case it was said: "The rule may now be thus stated: An alteration of a written instrument, if nothing appears to the contrary, should be presumed to have been made at the time of its execution. But generally the whole inquiry, whether there has been an alteration, and if so whether in fraud of the defending party or otherwise, to be determined by the appearance of the instrument itself or from that and other evidence in the case is for the jury.¹

In case VIII. it was said: "Amidst the conflict of authorities in this country, and with the little aid that can be derived from the modern English cases, I should be disposed to fall back upon the ancient common law rule—that an alteration of a written instrument, if nothing appear to the contrary, should be presumed to have been made at the time of its execution. I think this rule is demanded by the actual condition of the business transactions of this country, and especially of this State—where a great portion of the contracts made are drawn by the parties to them, and without great care in regard to interlineations and alterations. To establish an invariable rule, such as is claimed in behalf of the defendant, that the party producing the paper should in all cases be bound to explain any alteration by extrinsic evidence, would, I apprehend, do injustice in a very great majority of the instances, in which it should be applied. Such a rule might be tolerated—might perhaps be beneficially adopted—in a highly commercial country, like that of Great Britain, in regard to negotiable paper, which is generally written by men trained to clerical accuracy, and is upon stamped paper, the very cost of which would induce special care in the drawing of it; but I am persuaded its application here could not be otherwise than injurious. It is not often that an alteration can be accounted for by extraneous evidence; and to hold that, in all cases, such evidence must be given, without regard to any suspicious appearance of the alteration, would, I think,

¹ *Printrup v. Mitchell*, 17 Ga. 564 (1865).

in many instances be doing such manifest injustice, as to shock the common sense of most men."

"In this conflict of opinion," says Woodruff, J., after an exhaustive review of all the authorities, "it appears to me the sensible rule and the rule most in accordance with the decisions of our own State, is that the instrument, with all the circumstances of its history, its nature, the appearance of the alteration, the possible or probable motives to the alteration, or against it, and its effect upon the parties respectively, ought to be submitted to the jury; and that the court can not presume from the mere fact that an alteration appears on the face of the instrument, whether under seal or otherwise, it was made after the signing. Some alterations may be greatly to the disadvantage of the holder or party setting up the instrument. Shall it be presumed that he made them unlawfully against his own interest? Others may be indifferent as to him, and favorable to some other. No presumption in such case can exist against him."¹

There are, however, to be found cases which conflict with the rule above laid down. In *Jackson v. Osborn*,² the trial judge ruled that where there was an erasure or alteration in a deed the presumption of law was that it was made before the execution of the deed, and that it was incumbent on the party seeking to invalidate the deed to show that the alteration had been improperly made. On appeal this was held to be error. The court said: "Mr. Phillips in his treatise on Evidence³ says: 'If there is any blemish in the deed by rasure or interlineation, the deed ought to be proved, though above thirty years old, and the blemish satisfactorily explained. In such a case the jury would have to try whether the rasure or interlineation was before or after the delivery of the deed; for if the rasure was before that time the deed is still valid. It is only after

¹ *Maybee v. Sniffen*, 2 E. D. Smith, 1 (1851).

² 2 Wend. 535; 20 Am. Dec. 649 (1829).

³ 7 Vol. p. 405.

the delivery that a rasure or interlineation can effect a deed, and even then they are in some cases immaterial.' Mr. Justice Butler in his treatise¹ also says that a rasure or interlineation in a deed is a suspicious circumstance which will make it necessary even in the case of a deed of thirty years' standing, for the party to prove the deed by the witnesses, if living, or if dead, by proving their handwriting and the handwriting of the party, in order to encounter the presumption arising from the blemishes in the deed. When nothing appears but the fact of an erasure or interlineation in a material part of the deed of which no notice is taken at the time of the execution, it is a suspicious circumstance, which requires some explanation on the part of the plaintiff, but whether the explanation is satisfactory or not is for the jury to determine." In *Wilson v. Henderson*,² it was said: "It is a presumption of law that any material alteration of a note, appearing upon its face, was made after it goes into the hands of the payee, and is it for him to show that it was made under circumstances which sustain it? The authorities are both ways, and hence it is difficult to extract from them the true rule. The question was very fully considered in the Supreme Court of Connecticut in the case of *Bailey v. Taylor*,³ in which the evident leaning of the decision is against the presumption. Still it may be doubted whether the authorities cited by the court would not have better sustained an opinion the other way. The court said circumstances may be such as may require an explanation from the plaintiff. This is surely true, and it must be also clear that the whole question of alteration is for the jury. It is for them to determine whether it was made before, or after delivery, or whether it was with or without the consent of the maker. Assuming that the law presumes that any alteration appearing on the note was made after delivery, such presumption must be very much weakened, if not

¹ p. 255.

² 9 S. & M. 375; 48 Am. Dec. 716 (1845).

³ 11 Conn. 531.

destroyed, when the alteration operates prejudicially to the holder."¹

In an early case in Pennsylvania Chief Justice McKean had ruled that an interlineation in a deed would be presumed to have been made after its execution.² But this decision is no longer law in that State, all the subsequent cases leaving it to the jury to decide on the evidence whether the alteration was made before or after the execution.³

In Ohio it is laid down that where an alteration appearing on the face of an instrument is not peculiarly suspicious and beneficial to the party seeking to enforce it, the alteration will be presumed to have been made either before execution or by agreement of the parties afterwards.⁴

In *Burnham v. Ayer*,⁵ it is said: "Although a different rule prevails in other jurisdictions, it has been holden, and may be regarded as settled, in this State, that in the absence of evidence or circumstances from which an inference can legitimately be drawn as to the time when it was actually made, every alteration of an instrument will be presumed to have been made after its execution." The instrument in this case was a deed and the alteration was in the description.

In *Hill v. Barnes*,⁶ the date in a note which had originally been written May 4 had been altered to April 4. No evidence when the alteration was actually made was given, but a verdict for the plaintiff was taken by consent, subject to the opinion of the higher court. The Supreme Court ordered a new trial. "In the absence of all evidence," said Parker, C. J., "either from the appearance of the note itself, or otherwise, to show when the alteration was made,

¹ And see *Hefner v. Wenrich*, 22 Pa. St. 423 (1859); *Hill v. Cooley*, 46 Pa. St. 259 (1863).

² *Morris v. Vanderen*, 1 Dall. 67 (1793). And see *Paine v. Edsell*, 19 Pa. St. 178 (1852); *Prevost v. Gratz*, Pet. C. C. 364 (1816); *Taylor v. Crowninshield*, 5 N. Y. Leg. Obs. 209 (1816).

³ *Stahl v. Berger*, 10 S. & R. 171 (1823); *Babb v. Clemson*, *Id.* 494 (1823); *Barrington v. Bank of Washington*, 14 *Id.* 423 (1826); *Heflinger v. Shutz*, 16 *Id.* 46 (1837); *Hudson v. Reel*, 5 Pa. St. 379 (1847); *Vanhorne v. Dorrance*, 2 Dall. 308 (1795).

⁴ *Huntington v. Finch*, 2 Ohio St. 445 (1854).

⁵ 25 N. H. 351 (1857).

⁶ 11 N. H. 395 (1840).

it must be presumed to have been made subsequent to the execution and delivery of the note. This rule is necessary for the security of the maker, who must otherwise take evidence of the appearance of the note when it is delivered, in order to protect himself against alterations subsequently made without his privity." And the case was followed in *Humphreys v. Guilow*,¹ decided in 1843.

Two exceptions to Rule 84 obtain in the English courts for reasons in one case never, and in the other hardly ever, applicable here. Alterations and interlineations appearing on the face of a will are presumed to have been made after its execution. The presumption is made by the court for the purpose of carrying out more effectually the provisions of the Wills Act, which makes void all obliterations, interlineations or other alterations in a will after execution unless affirmed on the margin and attested by witnesses.² Nevertheless in some of the more recent cases the English judges have shown an inclination not to make any presumption even here. In *William v. Ashton*,³ Wood, V. C., said: "I find numerous alterations in this will, as to which the only information afforded by the testatrix is that she said she had made alterations without specifying what the alterations were which she had so made. I do not think that it is quite a correct mode of stating the rule of law to say that alterations in a will are presumed to have been made at one time or at another. The correct view, as enunciated in the case of *Doe v. Palmer*,⁴ is that the *onus* is cast upon the party who seeks to derive an advantage from an alteration in a will to adduce some evidence from which a jury may infer that the alteration was made before the will was executed. I do not consider that the court is bound to say

¹ 13 N. H. 386.

² *Greville v. Tyler*, 7 Moore P. C. 390 (1861); *Cooper v. Brockett*, 4 Id. 414 (1844); *Tatum v. Catamore*, 16 Q. B. 745 (1851); *Shallcross v. Palmer*, 15 Jur. 886 (1862); *Taylor v. Mosely*, 6 C. & P. 378 (1833); *Christmas v. Whonyates*, 3 Swab. & Tr. 81 (1862); *Simmons v. Rudall*, 1 Sim. (N. S.) 136 (1856); *Buck v. Buck*, 6 Eas. & Mar 581 (1848); *Re Duffy*, Ir. Rep. 5 Eq. 506 (1871).

³ *Johns. & M.* 115 (1860).

⁴ 16 Q. B. 747.

that it will presume such alteration to have been made either before or after execution. With regard to a will, I do not see any necessary presumption of the kind. As to a deed, a presumption is considered to exist that alterations have been made before execution, because if you presume them to have been subsequently introduced you presume a crime; but even that view has only recently been adopted. With respect to a will, this reasoning has no application. There is no crime in a testator choosing to make alterations in his own will, and all that can be said with respect to such alterations as these is that we do not know when they were made. Now a testator can not reserve to himself a power of making future testamentary gifts by unattested instruments. If a general statement by a testatrix that she had made some alterations in her will were to give validity to any alterations found in the instrument after her death, that would enable her at any time after such statement to make as many unattested alterations as she pleased. I apprehend the rule is that those who propound a doubtful instrument must make the doubt clear. I can not tell what alterations the testatrix made before attestation, or what interests might be affected by alterations subsequently made. Not being able to say which alterations are valid, I can not give effect to any of them.”¹

Secondly, in the case of bills of exchange and promissory notes required by statute to be stamped, the English courts make it incumbent on a party producing such an instrument to explain any alteration before it can be introduced in evidence.² But, as pointed out by Hall, J.,³ there are reasons for the ruling under the English Stamp Act which do not apply in other cases. The object of the common-law rule of proof is to protect one party against the fraud of

¹ And see *Re Oudge*, L. R. 1 P. & D. 543 (1868).

² *Johnson v. Duke of Marlborough*, 2 Stark. 818 (1818); *Bishop v. Chambre*, 3 C. & P. 55 (1827); *Knight v. Clements*, 8 Ad. & El. 215 (1838); *Clifford v. Parker*, 3 Man. & Gr. 910 (1841); *Carew v. Tattersall*, 3 Man. & Gr. 891 (1841); *Anderson v. Weston*, 6 Bing. N. C. 302 (1840); *Laykauff v. Ashford*, 12 Moore, 231 (1827); *Sibley v. Fisher*, 7 Ad. & El. 444 (1837); *Henman & Dickinson*, 5 Bing. 123 (1838).

³ *Beaman v. Russell*, *ante*.

another; that of the statute to protect the revenue from the fraud of all parties. "If an alteration be against the interest of the party claiming or be apparently in the handwriting of the party defending, and in either case were no appearances calculated to excite a suspicion of an intended fraud upon the latter party, it might be unjust to the party claiming to cast upon him the burden of showing by extraneous evidence when the alteration was made. But these considerations can have no weight under the Stamp Act. The question under that statute is not by whom or how the alteration was made, but merely the time when. One rule of evidence might perhaps be necessary to protect the interests of the government, while another might be quite sufficient for the preservation of those of the parties. And for the detection of fraud upon the revenue and to prevent its recurrence, a more stringent rule of proof may be required in England by considerations of public policy than justice to the parties would otherwise demand." And it is said by the learned judge, in the course of his opinion in this case, that the single question upon whom the burden of proof devolves to account for an alteration in a written instrument with reference to a supposed fraud upon the party, has never been presented to the English court in any of these cases. It has always been coupled with and been overridden by the more extended question in regard to a supposed fraud upon the revenue.

RULE 85.— But where the alteration is in a different handwriting from the rest of the instrument (A); or in a different ink (B); or is in the interest of the party setting it up (C); or is suspicious on its face (D); or the execution of the instrument is denied under oath (E), the burden of proof rests on the party producing the instrument to explain it to the satisfaction of the tribunal.

The authorities seem to be uniform on this point, viz., that when the alteration is suspicious on its face, and bene-

ficial to the party setting it up, he must explain it to the satisfaction of the jury.¹

An alteration in a note after its delivery is presumed to have been made by the payee, and the burden is on him to show the assent of the maker.²

Illustrations.

A.

I. An action is on a promissory note. The words, "with interest at eight per cent" seem to be added in a different hand. The burden is on the plaintiff to explain the alteration.³

II. A sues B. as indorser of a promissory note. The body of the note is in B.'s handwriting. At the end of the instrument are the words, "payable at the bank of Pittsburg." The court is requested, but refuses to rule that this raises a presumption of alteration after its execution. *Held*, error.⁴

In *Cox v. Palmer*,⁵ McCrary, J., after saying: "What is the presumption in such a case? Upon this question there is an apparent conflict of authority. I think, however, it is apparent only, and not real. There are cases in which it has been held that an interlineation is presumably an unauthorized alteration of the instrument after execution, and that the burden is upon the party offering the instrument in evidence to show the contrary. There are also cases in which interlineations have been held to be *prima facie bona fide*, and that the burden is upon the party attacking the instrument to show that it was altered after execution," says: "But I think that one rule governs in all these cases, and it is this: If the interlineation is in itself suspicious, as if it appears to be contrary to the probable meaning of the

¹ *Tillow v. Clinton Ins. Co.*, 7 Barb. 503 (1850); *Herrick v. Malin*, 22 Wend. 373 (1839); *Croft v. White*, 36 Miss. 455 (1858); *Clark v. Eckstein*, 23 Pa. St. 507 (1854); *Newcomb v. Presbury*, 8 Metc. 406 (1844); *Gillett v. Sweat*, 6 Ill. 475 (1844); *Davis v. Carlisle*, 6 Ala. 707 (1844).

² *White v. Hass*, 32 Ala. 432 (1858).

³ *Commercial Bank v. Lum*, 6 How. (Miss.) 414 (1843); *Bishop v. Chambre*, 3 O. & C. 55 (1827).

⁴ *Simpson v. Stackhouse*, 9 Pa. St. 186; 49 Am. Dec. 554 (1848).

⁵ 1 McCrary, 331 (1880).

instrument as it stood before the insertion of interlined words, or if it is in a handwriting different from the body of the instrument, or appears to have been written with a different ink — in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith and before execution.”

• In case II. it was said: “How stands the question on principle? The English decisions are founded in reason and not on considerations growing out of the stamp acts. He who takes a blemished bill or note takes it with its imperfections on its head. He becomes sponsor for them and though he may act honestly, he acts negligently. But the law presumes against negligence as a degree of culpability; and it presumes that he had not only satisfied himself of the innocence of the transaction, but that he had provided himself with the proofs of it to meet a security he had reason to expect. It is of no little weight too that the altered instrument is found in his hands and that no person else can be called on to speak of it; for, without a presumption to sustain him, the maker would, in every case, be defenseless. It may be said that the holder, with such a presumption against him, would also be defenseless. But it was his fault to take such a note. As notes and bills were intended for negotiation and as payers do not usually receive them, when clogged with impediments to their circulation there is a presumption that such an instrument starts fair and untarnished, which stands till it is repelled; and a holder ought, therefore, to explain why he took it branded with marks of suspicion which would probably render it unfit for his purposes. The very fact that he received it is presump-

tive evidence that it was unaltered at the time ; and to say the least his folly or his knavery raised a suspicion which he ought to remove. The maker of a note can not be expected to account for what may have happened to it after it left his hands ; but a payee or indorsee who takes it, condemned and discredited on the face of it, ought to be prepared to show what it was when he received it. Now it is agreed that the note before us was drawn and indorsed for the accommodation of the maker who negotiated it, and who consequently stands as if it had been drawn by the indorsee and indorsed by himself, as it might just as well have been, the difference being in the plan of the security and not in its effect. It was distinctly proved that the body of the note is in the handwriting of the defendant and that the words, "payable at the bank of Pittsburg," are not. The difference in the character of the writing is obvious, and the additional words are broken into two half-lines, for to have comprised them in one would have required it to be run through the signature and they were necessarily crowded into the left hand corner at the bottom of the paper. That is certainly not the ordinary collocation of the lines of a commercial instrument. Mr. Chitty says in his Treatise on Bills,¹ that a drawee ought not to accept a bill which has the least appearance of alteration ; and it was not disputed at the trial that this note had that appearance, or that the alteration was in a material part of it, its effect being to dispen-
se with personal notice of dishonor. The question was on the *onus* and the defendant prayed instruction that the body of the note being in his handwriting, and the questionable words being in a different hand, it was incumbent on the plaintiff to show that they were in the instrument at the time of indorsement, or with the defendant's consent ; to which the court responded that the jury must decide as a matter of fact. The response was a refusal of the prayer and a denial that there was any presumption to lead to a particular conclusion."

¹ p. 312.

B.

I. In an action on a written guaranty the words "and company" appear therein in a different ink and handwriting from the rest of the instrument. The burden is on the plaintiff to show that this was done before the instrument was executed.¹

"We are not prepared to say," said Metcalf, J., in case I., "that a material alteration manifest on the face of the instrument is in all cases whatsoever such a suspicious circumstance as throws the burden of proof on the party claiming under the instrument. The effect of such a rule of law would be that if no evidence is given by a party claiming under such an instrument the issue must always be found against him, this being the meaning of the 'burden of proof.' But we are of opinion upon the authorities, English and American, and upon principle, that the burden of proof in explanation of the instrument in suit in this case was on the plaintiff. It was admitted that the words 'and company' which were interlined in the guaranty were in a different handwriting from that of the rest of the instrument, and also in different ink. In such a case the burden of explanation ought to be on the plaintiff, for such an alteration certainly throws suspicion upon the instrument."

In *Smith v. McGowan*,² it was said: "There is no principle of the common law which requires a deed to be written throughout with the same colored ink. The fact that ink of different colors is used may or may not afford evidence of a fraudulent alteration of an instrument. It may often be an important item of evidence on that question, and it may be consistent with the utmost honesty. There is nothing in the fact, considered by itself, which will require the court to exclude the instrument for that reason as matter of law. It may be a proper consideration for

¹ *Wilde v. Armsby*, 6 Cush. 314 (1856); *Davis v. Jenny*, 1 Metc. 223 (1840). And see *Crabtree v. Clark*, 20 Me. 337 (1841).

² 3 Barb. 403 (1848).

the jury in connection with other facts on the question of a fraudulent alteration."

C.

I. A note was sued on dated in 1831. The date appeared to have been altered from 1835. The burden was on the plaintiff to explain it.¹

II. An action was brought on a bond dated November 11, 1821. The defense was that the date had been altered from November 11, 1820. It was not incumbent on the plaintiff to explain the alteration.²

In case I. the alteration was in the plaintiff's favor, for it entitled him to four years' more interest than as it originally stood. In case II., on the other hand, the alteration was prejudicial to the plaintiff, for it deprived him of a year's interest.

"Formerly," it was said in case II., "the court judged of an erasure by inspection; latterly the jury do. In judging by inspection the court governed itself, as jurors do now, by probabilities in the absence of positive proof. If the alteration on the erased part was in the handwriting of the obligee or a stranger, and beneficial to the obligee, the court adjudged it an erasure, that is an alteration, made after the execution, and avoided the deed. If prejudicial to the obligee, the court adjudged it no erasure, that is made before execution, and did not avoid the deed. If in the handwriting of the obligor either way, they adjudged it no erasure, that the alteration was made before execution, and did not avoid the deed. Juries are now governed by the same rules. In the case before us the date of the bond is altered, and it was made payable in 1821 instead of 1820, as it is said is evident from the erasure not being complete, as appears from an inspection of the deed, and the alteration is in the handwriting of the obligee, and prejudicial to the obligee, for he loses one year's interest. It is payable from the date or from a fixed period from the date. One

¹ Warren v. Layton, 3 Harr. (Del.) 404 (1840); Stoner v. Ellis, 6 Ind. 159 (1855).

² Pullen v. Shaw, 3 Dev. 238. And see Sayre v. Reynolds, 5 N. J. L. 737 (1830); Coulson v. Watson, 9 Pet. 98 (1835); Farlee v. Farlee, 21 N. J. L. 284 (1848).

of the rules before mentioned, to wit, that if the alteration is prejudicial to the obligee, though in his handwriting, it is no erasure, determines this case, as it is presumed that the alteration was made before execution. If the question was to be decided by the court, as formerly, we should pronounce it to be no erasure. In the absence of all evidence *dehors* the deed the jury were properly instructed to pronounce it so."

In *Stoner v. Ellis*,¹ it was said: "Where the alteration is of such a character as to defeat entirely the operation of the instrument, for any purpose, as in case of the erasure of the signature and seal to a deed, or other instrument, so that admitting all to be true that appears, upon the instrument, when produced, it would be void in law, it should be explained in the first instance, before it should be permitted to go to the jury. In other cases, the instrument should be given in evidence, and should go to the jury, upon the ordinary proof of its execution, although an alteration may appear in it, leaving the parties to make such explanatory evidence as they may choose to offer. But if there is neither intrinsic nor extrinsic evidence as to when the alteration was made the presumption of the law is, that it was made before or at the execution of the instrument. There are some considerations of public policy which seem to us to have weight in inducing this conclusion. With us, the business of conveyancing does not pertain to the legal profession exclusively. Where estates are large, and lands are held by the comparatively few, titles are seldom passed without great consideration, while with us the ownership of lands in fee is almost universal, and real estate is, like merchandise, a subject of traffic. Deeds are drawn by justices of the peace, and almost by any person of ordinary intelligence, who will observe usually much less accuracy and precision than where the business is in the hands of a branch of the legal profession. The same may be

¹ 6 Ind. 159 (1855).

said in regard to all sorts of traffic so common among our people, in which notes, agreements, and other contracts are executed with little regard to professional accuracy. To declare all these *prima facie* fraudulent and void, we are satisfied would be generally indulging in a presumption against the facts, and that it would produce more injustice than to hold them void."

D.

I. In an action on a bill of exchange the bill was produced by the plaintiff. The upper left-hand corner of the bill was torn off, carrying with it the word "second" as preceding the words "each for." The printed word "second" in the body of the bill had black lines drawn through it, and the word "only" written over it. The printed words "first unpaid" had also black lines drawn through them. The burden was on the plaintiff to explain this.¹

In *Dodge v. Haskell*,² Peters, J., says: "Where a plaintiff declares upon a note and offers it in evidence against the maker, there is a burden upon him to satisfy the jury that an apparent alteration of the note was made before delivery. This arises from the general burden of proof which the plaintiff has to sustain to show that the instrument declared on is the genuine and valid promise of the defendants. Therefore, if there is evidence each way upon a question of alteration, the preponderance must be in favor of the plaintiff. The jury are to be satisfied that a note is genuine and not fraudulent. But the paper itself, unaided by other evidence, may satisfy the jury or it may not. All depends upon circumstances. The alteration may be immaterial, or comparatively so, or natural or beneficial to the maker or made by the same pen and ink as the body of the instrument or in the hand writing of the maker (where one maker), or in that of the witness to the instrument, and in such cases it would not be suspicious.

¹ *Fontaine v. Gunther*, 31 Ala. 264 (1857). And see *Van Buren v. Cockburn*, 14 Barb. 118 (1849); *Ridgeley v. Johnson*, 11 Id. 540 (1851); *Waring v. Smyth*, 2 Barb. Ch. 11 (1847.)

² 60 Me. 429 (1879).

On the other hand the alteration may present indications of fraud or forgery. Whether it does or not is a question of fact and not of law. It can not be a question of law to decide whether a note is in two inks or one or two handwritings or one, or why so written. It is said that alteration *prima facie* indicates fraud. It is sure that it does not in all cases. On the other hand it is sure that fraud is not to be presumed. But it would be extreme to say that an instrument might not be so altered as to show upon its face the grossest attempt at forgery. Therefore what alteration or degree or kind of alteration may exist without being suspicious enough to demand explanation is for the jury to settle."

B.

I. Suit was brought upon the following instrument: "BROWN CITY, April 1, 1847. — Against the tenth day of July next, I promise to deliver at the residence of James Short fifty dollars' worth of good cattle, to be two years old past, not more than two shall be heifers, any number above the fifty dollars' worth will (thirty dollars' worth of salable cattle shall be delivered above the fifty \$5 worth) be received on the house debt, all to be salable cattle." The words in parenthesis had been interlined. The defendant, as required by statute, denied the execution of the instrument under oath. The plaintiff was bound to explain the alteration.¹

In case I. it was said: "Upon this point there is a conflict of the authorities. Some courts have held that if nothing appears to the contrary, the alteration will be presumed to have been made contemporaneously with the execution of the instrument. The reason given by the courts that have so decided is that the law will never presume wrong, and to hold an alteration to have been made after the execution of the instrument would be to presume the holder guilty of forgery. This reason has no foundation in this State, so far at least as relates to instruments of writing upon which suits are brought or which are set up

¹ *Walters v. Short*, 10 Ill. 252 (1848). But in a Texas case where the alteration was not an apparent one (*viz.*, following a blank), the burden of proving the alteration — the execution being denied under oath — was held to be on the defendant. *Wells v. Moore*, 15 Tex. 531 (1855); *Muckleroy v. Bethany*, 37 Id. 561 (1864).

by way of defense or set-off, the execution of which by the fourteenth section of the eighty-third chapter of the Revised Statutes a party is not permitted to deny, except on oath. When such a denial is made on oath, as in the present case, the law would presume quite as great wrong in assuming that the party making oath that the instrument was not his, had been guilty of perjury, as in assuming that the holder of the instrument had altered it after its execution." The court in this case criticised the soundness of the rule independent of the statute also.

In one of the latest cases the rule is laid down thus, viz.: that where there is no dispute on the interlineation or alteration, the presumption is that it was made before the execution, but when a contest arises and the instrument is offered in evidence, and the alteration is beneficial to the party presenting it, the presumption of law is not the other way (viz., that it was made after) but the burden is on him to explain it.

"When we look at a written instrument containing an interlineation or erasure," said Woodward, J., "without reference to contested rights, the natural and fair presumption doubtless is that the alteration was made before signature, because if altered after execution it would be forgery, which is never to be presumed. Instruments of writing executed with the solemnities appointed by law are like the men who made them, to be presumed innocent until some circumstance is shown to beget a counter presumption. But when a contest occurs, and the instrument is offered in evidence, the question at once arises whether the alteration is beneficial to the party offering it; if it be not, as in the instance of a bond or note altered to a less sum, the *prima facie* presumption is unchanged; if it be, as was the case here, we do not presume a forgery, but we hold the party offering it in evidence and seeking advantage from it bound to explain the alteration to the satisfaction of the jury. The initiative and burden of proof are thrown on him. If the interlineation or erasure have been noted in the attestation

clause as having been made before signature, this is sufficient, or if the similarity of ink and handwriting, or the conduct of the parties or other facts proved shall persuade a jury that it was so made, the instrument is relieved from suspicion, and the party offering it is entitled to the benefits of it. So long as any ground of suspicion is apparent on the face of the instrument, the law presumes nothing, but leaves the question as to the time when it was done to be ultimately found by the jury upon proofs to be adduced by him who offers the evidence."¹

In *Simpson v. Davis*,² it was ruled that where a declaration on a promissory note alleges that the defendant made the note, and the answer denies this and alleges an alteration, proof of the defendant's signature is *prima facie* evidence that the whole body of the note written over it is the act of the defendant; but the burden of proof is on the plaintiff to show that the note declared on was the note of the defendant.

In *Bailey v. Taylor*,³ the court refused to rule that there was a presumption that an alteration of the amount of a note had been made after its execution, saying: "The result to which we have arrived is that where there is an erasure or alteration in an instrument under which a party derives his title and the adverse party claims that such erasure or alteration was improperly made, the jury are from all the circumstances to determine whether the instrument is thereby rendered invalid. Circumstances may be such as may require this explanation on the part of the plaintiff or on the other hand may arise where it would be absurd to require it."

¹ *Jordan v. Stewart*, 23 Pa. St. 246 (1854).

² 119 Mass. 269 (1876).

³ 11 Conn. 531 (1836).

PART IV.

**PRESUMPTIONS IN THE LAW OF
REAL PROPERTY.**

CHAPTER XVIII.

THE PRESUMPTIONS FROM POSSESSION AND LAPSE OF TIME.

RULE 86. — Where it is shown that any person has for a long period of time exercised any proprietary right which might have had a lawful origin by grant or license from the public or from a private person, and the exercise of which might and naturally would have been prevented by the persons interested if it had not had a lawful origin, the presumption arises that such right had a lawful origin, and that it was created by a proper instrument which has been lost.¹

Illustrations.

I. The question is whether B. is entitled to recover from A. the possession of lands which A.'s father and mother successively occupied from 1754 to 1798, and which B. had occupied without title from 1798 to 1809.

¹ Thus, a grant is presumed from lapse of time. *Field v. Brown*, 24 Gratt. 74 (1873); *Hardy v. McCullough*, 23 Gratt. 251 (1873); *Rooker v. Perkins*, 14 Wis. 79 (1861); *Hurst v. McNeill*, 1 Wash. O. C. 70 (1804); *Rochell v. Holmes*, 3 Bay, 487 (1805); *Frost v. Brown*, 3 Bay, 133 (1798); *Williams v. Donnell*, 3 Head, 695 (1859); *Marr v. Gilliam*, 1 Cold. 488 (1860); *Grimes v. Bastrop*, 26 Tex. 310 (1862); *Taylor v. Watkins*, 26 Tex. 638 (1863); *Rhodes v. Whitehead*, 27 Tex. 304 (1863); *Walker v. Hanks*, 27 Tex. 535 (1864); *Farrer v. Merrill*, 1 Me. 17 (1820); *Tinkham v. Arnold*, 3 Me. 120 (1824); *Cheney v. Watkins*, 1 H. & J. (Md.) 327 (1804); *Sparhawk v. Bullard*, 1 Metc. 95 (1840); *Proprietors v. Bullard*, 2 Metc. 363 (1841). As a deed. *Hepburn v. Auld*, 5 Cranch, 203 (1809); *Weatherhead v. Baskerville*, 11 How. 329 (1850); *Townsend v. Downer*, 33 Vt. 183 (1859); *Melvin v. Locks and Canals*, 17 Pick. 255 (1835); *Newman v. Studley*, 5 Mo. 291 (1838); *Blair v. Marks*, 27 Mo. 579 (1858); *Chiles v. Conley*, 3 Dana, 21 (1834). Or a lease. *Sellick v. Starr*, 5 Vt. 255 (1833). And title to property generally from possession. *Borough of Birmingham v. Anderson*, 40 Pa. St. 507 (1861); *Warner v. Henby*, 47 Pa. St. 187 (1864); *Willey v. Day*, 51 Pa. St. 51 (1865); *Youngman v. Linn*, 53 Pa. St. 413 (1866); *Glass v. Gilbert*, 58 Pa. St. 266 (1866); *Duke v. Thompson*, 16 Ohio, 35 (1847); *Society for Propagation of the Gospel v. Young*, 2 N. H. 310 (1820); *Wendell v. Blanchard*, 2 N. H. 456 (1822); *Thompson v. Carr*, 5 N. H. 510 (1831); *Cambridge v. Lexington*, 17 Pick. 223 (1835); *Fourth Parish v. Springfield*, 18 Pick. 319 (1836); *Fritz v. Brandon*, 73 Pa. St. 343 (1875); *Jackson v. McCall*, 10 Johns. 377; 6 Am. Dec. 343 (1813); *Fitzhugh v. Croghan*, 3 J. J. Marsh. 429; 19 Am. Dec. 139 (1820); *Valentine v. Piper*, 23 Pick. 85; 83 Am. Dec. 715 (1839); *Brown v. McKinney*,

The undisturbed occupation for thirty-nine years raises a presumption of a grant by the crown to A.'s father.¹

II. A fishing mill dam was erected more than one hundred and ten years before 1861, in the River Derwent, in Cumberland (not being navigable at that place), and was used for more than sixty years before 1861, in the manner in which it was used in 1861. This raises a presumption that all the upper proprietors whose rights were injuriously affected by the dam had granted a right to erect it.²

III. Title to a fishery was in S. in 1748; partition of his estate was had, and it was adjudged in 1754 to "the representatives of M., wife of J.," subject to a ground rent. In 1805 E. and others, reciting that they were heirs of J., conveyed to C. an interest in the fishery. The presumption is that C.'s title was good.³

IV. In 1778 J. A. conveyed a parcel of land described as "part of a lot of swamp which D. S. bought of P. A." The land was occupied under this deed from 1778 to 1830. The existence of a deed from D. S. to J. A. will be presumed.⁴

V. An agreement for the sale of a piece of land is made in 1689. Parties under that agreement have occupied since. A jury in 1809, may presume a conveyance pursuant to the agreement.⁵

VI. A grant of a stream of water or of a part thereof by fixed boundaries will be presumed to have been made by a deed, after an adverse possession of twenty years.⁶

VII. A church is built on a tract of land, occupying a part thereof as a burial ground for ninety years. This raises a presumption of a grant from the State.⁷

9 Watts, 565; 86 Am. Dec. 129 (1840); *Berthelemy v. Johnson*, 3 B. Mon. 90; 38 Am. Dec. 179 (1842); *Casey v. Inloes*, 1 Gill. 430; 39 Am. Dec. 658 (1844); *McCorry v. King*, 3 Humph. 267; 39 Am. Dec. 165 (1842); *Farrow v. Edmundson*, 4 B. Mon. 665; 41 Am. Dec. 250 (1844); *Budd v. Brooke*, 3 Gill (Md.), 198; 43 Am. Dec. 321 (1845); *Gathings v. Williams*, 1 Ired. (L.) 497; 44 Am. Dec. 49 (1845); *Hoev v. Finnan*, 1 Pa. St. 295; 44 Am. Dec. 129 (1846); *Jackson v. Moore*, 13 Johns. 516; 7 Am. Dec. 579 (1816); *Alexander v. Walter*, 8 Gill, 237; 50 Am. Dec. 688 (1849); *Clafin v. Malone*, 9 B. Mon. 486; 50 Am. Dec. 525 (1849); *Lenoir v. Rainey*, 15 Ala. 667 (1849); *McCall v. Doe*, 17 Ala. 533 (1850); *Sparks v. Rawls*, 17 Ala. 311 (1850); *Barnes v. Mobley*, 21 Ala. 233 (1852); *Hobbs v. Bibb*, 3 Stew. (Ala.) 54 (1839); *Wilson v. Glenn*, 68 Ala. 383 (1890); *Hanford v. Fitch*, 41 Conn. 486 (1874); *Crow v. Marshall*, 15 Mo. 499 (1852); *Oolvin v. Worford*, 20 Md. 338 (1863); *Frantz v. Ireland*, 66 Barb. 836 (1873).

¹ *Goodtitle v. Baldwin*, 11 East, 488; see *Devine v. Wilson*, 10 Moore P. C. 502.

² *Leconfield v. Lonsdale*, L. R. 5 O. P. 657.

³ *Carter v. Tinicum Fishing Co.*, 77 Pa. St. 310 (1875).

⁴ *Ryder v. Hathaway*, 21 Pick. 208 (1833); *White v. Loring*, 24 Pick. 319 (1837).

⁵ *Jackson v. Murray*, 7 Johns. 6 (1810); see *Jackson v. Schoonmaker*, 7 Johns. 13 (1810); *Jackson v. Sharp*, 9 Johns. 165 (1812); *Doe v. Campbell*, 10 Johns. 475 (1813).

⁶ *Bullen v. Runnells*, 2 N. H. 255; 9 Am. Dec. 55 (1830); *Strickler v. Todd*, 10 S. & R. 63; 13 Am. Dec. 649 (1823).

⁷ *Mather v. Trinity Church*, 3 S. & R. 509; 8 Am. Dec. 663 (1816).

VIII. A person has had the possession and use of an incorporeal hereditament for a long time. The law presumes a grant to him of such right.¹

IX. A person has had the control of an easement for a long time. The grant of the easement is presumed from the lapse of time.²

X. No claim of dowers is asserted on land for thirty-five years. It is presumed that none exists.³

XI. A person has occupied certain land for forty years. This raises a presumption of the ouster of a co-tenant, if he had any at the beginning.⁴

XII. A road has been used for a long time. A dedication of it to the public is presumed.⁵

In case III. the court reviewed the Pennsylvania cases at length: "Presumptions arising from great lapse of time and non claim," said Agnew, C. J., "are admitted sources of evidence, which a court is bound to submit to a jury as the foundation of title by conveyances long since lost or destroyed. This is stated by C. J. Tilghman in *Kingston v. Leslie*.⁶ There the absence of all claim for years on the part of a female branch of a family, represented by Honoria Hermann, at an early day, was held to constitute a ground to presume that her title had been vested in the male branch. Judge Tilghman remarked: 'I do not know that there is any positive rule defining the time necessary to create a presumption of a conveyance. In the case of easements and other incorporeal hereditaments, which do not admit of actual possession, the period required by law

¹ *Million v. Riley*, 1 Dana, 359; 25 Am. Dec. 149 (1833); *Arnold v. Stevens*, 24 Pick. 108; 35 Am. Dec. 305 (1839); *Mitchell v. Walker*, 3 Alk. (Vt.) 266; 16 Am. Dec. 710 (1827).

² *Hanson v. McCue*, 42 Cal. 303 (1871). But the English doctrine of a presumption of a grant or contract to the owner of land having an unobstructed flow of light and air to his windows for twenty years has not been adopted in the United States. *Pierre v. Fernald*, 26 Me. 436 (1847); *Parker v. Foote*, 19 Wend. 309.

³ *Ross v. Clore*, 3 Dana, 189 (1835); and see *Breckinridge v. Walters*, 4 Dana, 637 (1836).

⁴ *Woolsey v. Mors*, 19 Hun, 373 (1879).

⁵ *Rosser v. Bunn*, 66 Ala. 89 (1890); *New Orleans, etc., R. Co. v. Jones*, 68 Ala. 48 (1890). So a right of way is presumed from lapse of time (*Lawton v. Rivers*, 2 McCord (S. C.) 445; 13 Am. Dec. 741 (1823); *State v. Bunker*, 59 Me. 366 (1871); *Com. v. Low*, 13 Pick. 409 (1826)) and a right of water. *Campbell v. Smith*, 3 Halst. (N. J.) 140; 14 Am. Dec. 400 (1825); *Watkins v. Peck*, 15 N. H. 360; 40 Am. Dec. 156 (1843).

⁶ 10 S. & R. 383.

for a bar by the statute of limitations is usually esteemed sufficient ground for a presumption.' This doctrine of lapse of time is discussed at large by Justice Rogers in *Reed v. Goodyear*.¹ 'The courts of law,' he remarks, 'pay especial attention to rights acquired by length of time. Although it has been doubted (he says) whether a legal prescription exists in Pennsylvania, yet the doctrine of presumption prevails in many instances.' He quotes and approves the language of Chief Justice Tilghman in *Kings-ton v. Leslie*, in relation to presumptions in the case of easements and incorporeal hereditaments, and adds: 'The rational ground for a presumption is where, from the conduct of the party, you must suppose an abandonment of his right.' Among the cases he cites one directly applicable to a fishery: 'So a plaintiff had forty years' possession of a piscatory; the court decreed the defendants to surrender and release their title to the game, though the surrender made by the defendant's ancestor was defective.'² Justice Sergeant said, in *Foulk v. Brown*:³ 'We will not encourage the laches and indolence of parties, but will presume, after a great lapse of time, some compensation or release to have been made. Thus, length of time does not operate as a positive bar, but as furnishing evidence that the demand is satisfied. But it is evidence from which, when not rebutted, the jury is bound to draw a conclusion, though the court can not.' Again, he says: 'The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard for the peace and security of society. Justice can not be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them. Papers which our predecessors have carefully preserved are often

¹ 17 S. & R. 353, 355.

² *Penrose v. Trelawney*, cited in *Vernon*, 196.

³ 2 Watts, 214, 215.

thrown aside or retained as useless by their successors.' Acts of ownership over incorporeal hereditaments, corresponding to the possession of corporeal, are deemed a foundation for a presumption. 'The execution of a deed,' says Gibson, C. J., 'is presumed from possession in conformity to it for thirty years; and why the entire existence of a deed should not be presumed from acts of ownership for the same period, which are equivalent to possession, it would not be easy to determine.'¹ And said Black, C. J., in *Garrett v. Jackson*:² 'But when one uses an easement whenever he sees fit, without asking leave and without objection, it is adverse, and an uninterrupted enjoyment for twenty-one years is a title which can not afterwards be disputed. Such enjoyment without evidence to explain how it began, is presumed to have been in pursuance of a full and unqualified grant.' This is repeated by Justice Woodward in *Pierce v. Cloud*.³ See his remarks also in *Fox v. Thompson*,⁴ that links in title are supplied from long and unquestioned assertion of title. The same principles are repeated by the late C. J. Thompson in *Warren v. Henby*.⁵ The necessity of relaxing the rules of evidence in matters of ancient date was shown in *Richards v. Elwell*,⁶ a case of parol bargain and sale of land, and possession for forty years. The court below held the party to the same strictness of proof required in a recent case. It was then said by this court: 'If the rule which requires proof to bring the parties face to face, and to hear them make the bargain or repeat it, and to state all its terms with precision and satisfaction, is not to be relaxed after the lapse of forty years, when shall it be? After a lapse of fifty or sixty years it is not probable that any witness can be found above ground to state anything. Shall we wait for that period before we begin to relax? In the ordinary course of human affairs forty years are almost as likely to carry the proofs

¹ *Taylor v. Dougherty*, 1 W. & S. 337.

² 8 Harris, 335.

³ 6 Wright, 103-114.

⁴ 7 Casey, 174.

⁵ 12 Wright, 190.

⁶ 12 Wright, 61.

beyond the memory of living witnesses. It is contrary to the presumptions raised in all other cases — presumptions which are used to cut off and destroy rights and titles founded upon records, deeds, wills, and the most solemn acts of men. Based upon a much shorter time we have the presumption of a deed, grant, release, payment of money, abandonment and the like.' And again: 'There is a time when the rules of evidence must be relaxed. We can not summon witnesses from the grave, rake memory from its ashes, or give freshness and vigor to the dull and torpid brain.' The same principles are held in the following cases. *Turner v. Waterson*,¹ *Hastings v. Wagner*,² *Brock v. Savage*.³ The present case is stronger than any herein cited. The title of Joseph Carter had its inception in 1796-97, and its full completion in 1805. Living witnesses on the trial carried back his actual enjoyment and possession of this fishery upon the land now held by the defendants, to the very beginning of this century. From that time it has continued without challenge or denial by any one claiming title under Mary Claxton or her heirs. That of itself is sufficient to raise a presumption of any deeds, grants or devolutions by descent to make a good title in Joseph Carter to the fishery devised to David Gaudulier. When to this we add the proceedings in partition, and the recitals in the deeds, together with the antecedent lapse of fifty years from the time of the partition, all doubt vanishes as to the devolution of the title by regular steps to Joseph Carter."

In case VI.⁴ it was said: "It is unnecessary to decide to what extent and under what circumstances the occupation of a stream gives to the first occupant a property in the current, so as to prevent the owner of lands above him from detaining, diverting or exhausting the water by any erection, not leaving sufficient for all the beneficial purposes to which it had been applied below, considered of

¹ 4 W. & S. 171.

² 7 Id. 215.

³ 10 Wright, 83.

⁴ 10 S. & R. 63; 13 Am. Dec. 649 (1822).

itself and without regard to length of time, because in this case there has been an enjoyment by the plaintiffs, and those under whom they claim, of this mill, in a particular way and to an ascertained extent, for a time beyond which the memory of man runneth not to the contrary. And if a right could be acquired by prescription, this mill, from its antiquity, ought to have all the privileges of an ancient mill. Its existence and uninterrupted use may be traced as far back as the first settlement of the country, from the time most probably when the first Blunston's license was granted, and when it was a frontier settlement. The man who first erects a mill in a new country is considered as a public benefactor, and no subject ought to be treated with more tenderness, no possession more respected, commenced as it was with the assent of all the proprietors of the adjoining tracts, and enjoyed, as it has been, without any interruption and with the approbation of all for near a century. And if it were necessary to presume a grant of all the water right necessary for its use, I would, without hesitation, instruct a jury to presume it. For the continued acknowledgment, nay, the continued silence, of the enemies of the right, of all whose interests were affected by it, afford of themselves the strongest evidence of its legal foundation, though nothing were found in any deed respecting it. And I begin to think that the country has been long enough settled to allow of the time necessary to prove a prescription;¹ and even prescription presupposes a grant to have existed. But there is sufficient time, by analogy to the statute of limitations, to protect the plaintiffs in their full enjoyment of the whole stream, and to sustain this action for the disturbance of the right. It is well settled that if there has been an uninterrupted exclusive enjoyment, above twenty-one years, of water in any particular way, this affords a conclusive prescription of right in the party so enjoying it, and this is equal to a right by prescription."

¹ See 6 Mass. 90.

In *University of Vermont v. Reynolds*,¹ it was said: "In cases of prescription the possession is conclusive as to the right. There are certain other cases in which the presumption is not considered as altogether a legal inference, but must be made by the jury, and yet the court advise or direct the jury to make such presumption. The enjoyment of certain incorporeal hereditaments for the period of twenty years, if adverse, establishes the right to such enjoyment founded on the presumption of a grant; but this possession is liable to be explained. The enjoyment is, therefore, not an absolute title, but may be rebutted. But if the enjoyment was adverse, it affords sufficient ground for such presumption. Chancellor Kent says the later English authorities give to this presumption the most unshaken stability, and they say it is conclusive evidence of right. Judge Story, in the case of *Tyler v. Wilkinson*, considers it in this light, and says that this presumption may go to the extinguishment of a right in various ways, as well as by grant. In these cases, although the courts do not decide upon these presumptions as purely questions of law, yet they direct the jury to make them to answer some purposes of justice, and to quiet possessions. These cases differ altogether from those where the jury are to make their inferences and deductions from the weight of testimony as to the existence or loss of a deed or grant. This second class of presumptions, where the jury are advised to make them, it will be found, apply to corporeal as well as incorporeal hereditaments. Thus, a grant of land may be presumed, as well as a grant of a fishery, or common, or way. And many cases of this kind are to be found: *Jackson v. McCall*,² *Jackson v. Murray*,³ *Jackson v. Hudson*.⁴ In the latter case, an outstanding title, founded on a deed or release, which was in evidence, was presumed to have been extinguished, as the title had never been asserted or claimed. From comparing

¹ 3 Vt. 224 (1831).

² 10 Johns. 377; 6 Am. Dec. 343.

³ 7 Id. 5.

⁴ 3 Id. 375; 3 Am. Dec. 500.

these cases with the case of *Doe ex dem. Fenwick v. Reed*,¹ it may be inferred that where there has been a long continued possession which in its origin was or would have been unlawful unless there had been a grant, or if the origin of such possession can not be accounted for without considering it either as unlawful, or also lawful by virtue of a grant, the court will not infer that the possession was unlawful, but direct the jury to presume such grant, or anything which will confirm the possession. But if the original possession was consistent with the fact of there having been no grant, then, although the possession may have been ever so long, it will be left to the jury to say whether they believe such grant has been made, and they must determine according to the weight of the evidence." And further, in the same case,² it was said: "The measure of the law is *ex diuturnitate temporis omnia præsumuntur solemniter esse acta*."³ An act of Parliament, a grant from the crown, a deed, and in fact anything which will quiet a possession, may be presumed from length of time, where such act, grant, or deed would have been lawfully passed, made or given; and this presumption is said to be founded: (1) On the principle that the law will not presume any man's acts to be illegal, but will attribute such possession to a legal origin: (2) that the failure to interrupt such possession by those who had the right arose from their knowledge that it was lawful in its inception; and (3) upon principles of public policy for quieting men in their possessions."

In *Piense v. Fernald*,⁴ it was said: "The principle upon which the presumption of grants or other contracts for the security of rights and easements is made, is that when one person knowingly permits another for a long course of years, and without molestation or interruption, to claim and enjoy rights, easements, or servitudes injurious to him or his estate, it would be against man's experience, and

¹ 5 B. & Ald. 233.

² 3 Vt. 234; 25 Am. Dec. 240 (1831).

³ Co. Lit. 6.

⁴ 26 Me. 436 (1847).

contrary to his motives of conduct, to account for it so satisfactorily in any other manner, as to presume that he had authorized it by some grant or agreement. When it appeared that the enjoyment has existed by the consent or license of the person who would be injured by it, no such presumption can be made."

In *Strimpfler v. Roberts*,¹ Chief Justice Black, in considering the question of lapse of time as affecting disputes as to land, uses this language: "It is true that the transaction which creates the contest between these parties is entirely too old to be investigated now with the slightest hope of ascertaining the truth. It is impossible for us to feel any confidence in the evidence which can be furnished by men of these times concerning occurrences so remote. Fifty-two years went round between the time when the purchase-money for this was paid and the bringing of the present suit. During all that time neither Benson, nor his heirs, nor anybody else deriving title from him, made any claim to the land, nor paid taxes for it, nor exercised any act of ownership over it, nor manifested the least sign of consciousness that they had a title to it. We are now asked to determine the rights of the parties, on such facts as can be fished up from the oblivion of more than half a century. Nearly two generations have lived on the earth and been buried in its bosom since this business was transacted. Of the men who were then in active life and capable of being witnesses, not one in twenty thousand is now living. Written documents whose production might have settled this dispute instantly have been, in all human probability, destroyed or lost or thrown away as useless. The matter belongs to a past age, of which we can have no knowledge except what we derive from history, through whose medium we can dimly discern the outline of great public events, but all that pertains to men's private affairs is wholly invisible, or only visible in such a sort as to con-

¹ 18 Pa. St. 299 (1852).

found the judgment. 'No man,' says Mr. Justice Sergeant,¹ 'ought to be permitted to lie by, while his rights can be fairly investigated and justly determined, until time has involved them in uncertainty and obscurity, and then ask for an inquiry.' For such reasons as these it is that every civilized society has fixed a limited time within which all rights must be prosecuted. Where this is not done by positive enactment of the Legislature, the judiciary calls in the aid of presumption; and courts of equity, though not bound by the Statutes of Limitation, close their doors against stale demands as sternly as the courts of law. Time will raise presumptions as conclusive for or against an original title as it will in other cases. We have as little power to read the ashes of burnt papers, or call dead witnesses from their graves to testify in a dispute about business transacted by the land-jobbers of the last century, as we would have if the controversy was on any other subject. It is accordingly settled that the non-return of a survey for some years, without taking possession or paying the surveyor's fees, is an abandonment of the warrant.² And even when the negligence is imputable to the officer, a long delay will defeat the warrantee's title.³ The title of a warrantee is presumed to have been conveyed, where no claim is made under it for a long time.⁴ A sale of warranted land for taxes, though irregular and void if the warrant holder had made early opposition, becomes a perfect title after an acquiescence of twenty-four years.⁵ Payment of taxes for twenty-one years is presumptive evidence of a conveyance from the warrantee.⁶ A survey, unimpeached for twenty-one years, is conclusively believed to have been regular;⁷ and that even where there is an unexecuted order of resurvey by the board of property.⁸ In short, the courts of this State seem uniformly (and

¹ 2 Watts, 115.

² 2 Pa. St. 384.

³ 4 Watts, 140.

⁴ 2 Binn. 468.

⁵ 17 Ser. & R. 350.

⁶ 1 W. & S. 324.

⁷ 2 Watts, 390; 1 W. & S. 68.

⁸ 7 Barr. 67.

especially of late) to have refused to go back more than twenty-one years to settle any difficulty about the issuing of warrants or patents, or the making or returning of surveys, or the payment of purchase-money to the commonwealth. These questions, like others, are disposed of according to the legal presumptions which arise from the lapse of time. The time which raises a presumption which will act on an interest in land is twenty-one years;¹ and this presumption unrepelled will defeat any claim that is set up against it."

In a leading case Mr. Justice Story said: "The doctrine as to presumption of grants has been gone into largely on the argument, and the general correctness of the reasoning is not denied. There is no difference in the doctrine whether the grants relate to corporeal or incorporeal hereditaments. A grant of land may as well be presumed as a grant of a fishery or a common or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession."² That a fence between two farms has been kept up for many years nearly in the same place, but not permanent and stationary does not raise the presumption that it is the true boundary. It is merely evidence of an agreement and acquiescence in the line as the true line.³ The doctrine of adverse possession is to be taken strictly and not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the

¹ 4 W. & S. 297.

² Story, J., in *Ricard v. Williams*, 7 Wheat. 109 (1823).

³ *Knight v. Coleman*, 19 N. H. 118; 49 Am. Dec. 147 (1848).

true owner.¹ If a person enters into possession of land and holds it, without more, the presumption is he claims title.²

In Pennsylvania it has been held that possession for thirty years under a survey in the handwriting of a deputy surveyor, does not raise a presumption that the survey was made by proper authority.³ "Presumptions from length of time are those which the law makes without regard to what may have been the actual state of the fact. They are conclusions of law, not of fact; and neither the court nor the jury is supposed to believe what they take to be conclusively established as true. The particular circumstances of possession and length of time are to be determined by the jury, but the inference from them is for the court. This principle of decision is had recourse to from necessity, because, from the remoteness of the period of the supposed transaction, there is no means of ascertaining the actual state of the fact, and it therefore holds in judging only of things which belong to antiquity. In England, a grant may be presumed against the crown; but less readily than against an individual. In this State, from the very nature of our land titles, the reason of this difference holds with additional force. In other countries, holding by permission of the State, is a rare circumstance; with us, holding by permission under an implied contract for a conveyance to be executed at an indefinite period subsequently, is a common origin of title. This remark is applicable in a greater or less degree to every part of the State; but it is obvious that to raise this kind of presumption, a greater length of time will be required, where the population is sparse, and the possession a matter of little notoriety, than where the population is dense, and possession of a nature to arrest the

¹ *Jackson v. Sharp*, 9 Johns. 163 (1812); *Rung v. Shonenberger*, 2 Watts, 23; 26 Am. Dec. 95 (1833).

² *Rung v. Shonenberger*, 2 Watts, 23 (1833). As to possession of written instruments as evidence of title, see *Hill v. Beach*, 12 N. J. (Eq.) 31 (1858).

³ *Wilson v. Stoner*, 9 S. & R. 664 (1823).

general attention. In *Mather v. The Ministers of Trinity Church*, the land which was the subject of the presumed grant lay in the neighborhood of Philadelphia, the oldest and most thickly inhabited part of the State; and the occupancy of it by the erection of a church on it, in which divine service was regularly celebrated, and by using a part of it as a cemetery, was of a nature so notorious as to preclude all possibility of its having been unknown to the proprietary officers, or to the government, after the proprietary estates were assumed by the commonwealth. Under these circumstances, it was held that a grant ought to be presumed after ninety years. At the time, too, when this possession commenced, there was scarcely anything like method in the issuing of rights to land; after the application system was introduced, the business of the land office was conducted with regularity, and the locations were duly registered in the proper office. To this may be added that the location in question, if in fact one ever existed, was for land in a part of the State comparatively new and thinly inhabited, where taking possession without a grant was a common mode of laying a foundation for a title; and that the occupancy in this particular instance was attended with no particular circumstances of notoriety. It is impossible to lay down any rule on the subject of presumption which could be safely applied to anything like a majority of the cases that may arise; these must be judged of from their particular circumstances. As a standard for general reference, the ordinary period of human existence might, perhaps, be found more convenient in practice, and thought more consistent with the reason of the thing than any other that could be proposed; for while a matter may be susceptible of proof by living witnesses, it can not be classed with the things of antiquity. But this is thrown out merely by way of suggestion. We establish no general rule as to presumptions against the commonwealth, much less do we pretend to determine what would be a reasonable period as

against an individual. We are of opinion the period of thirty years was insufficient to raise a presumption of the existence of a location, or any other authority on which Baird's survey might have been made; and consequently that the survey ought not to have gone to the jury; and that even if it might rightly have been admitted, instructing the jury that there was nothing in the way of a presumption in favor of the existence of a location was error."

An act of the Legislature may be presumed.¹ Like a grant a statute may be presumed, notwithstanding the public records show no trace of such a law. But this presumption will only be made in cases where the Legislature might have acted, and does not arise where by a constitutional limitation or well known custom it could not or would not have passed such a law.

RULE 87. — Where there exists no power to make a grant, none can be presumed from long possession.

Illustrations.

I. To sustain A.'s title it is necessary to presume a deed from the trustees of a university which held the lands in question. The trustees never had power to convey by deed. The presumption can not arise.²

II. To sustain B.'s title a grant from the State to his ancestors must be presumed. A prior grant of the same land to C.'s ancestors is shown. The presumption can not be made unless it is proved that the grant to C. had been revoked.³

In *McCarty v. McCarty*,⁴ the question being as to the title to land, a deed executed by a *feme covert* was relied on. The deed was valid if the woman was married at the

¹ *Lady Stafford v. IJewellin*, 8kin. 78; *Att'y-Gen. v. Ewelime Hospital*, 17 Beav. 380; *Lopez v. Andrews*, 8Man. & R. 329, note; *McCarty v. McCarty*, 3 Strobh. (L.) 6; 47 Am. Dec. 585 (1847).

² *University of Vermont v. Reynold*, 3 Vt. 284 (1831).

³ *Id.*

⁴ 3 Strobh. (L.) 6; 47 Am. Dec. 585 (1847).

time, and the court was asked after twenty year's possession under it to presume a statute granting a divorce. In that State, South Carolina, divorces were not granted by the courts and had always been refused by the Legislature. The court refused to make the presumption. Said the court: "Best, in his treatise on Presumptions, tells us there is hardly a species of act or document, public or private, that will not be presumed in support of possession. Even acts of Parliament may be thus presumed. Under this authority, if a divorce ever had taken place, or even could take place in this State, I would not hesitate to say that an act for that purpose ought to be presumed in this case. But, as was said in *Boyce v. Owens*,¹ 'the marriage contract in this State is regarded as indissoluble by any human means. Nothing short of the actual or presumed death of one of the parties can have the effect of discharging its obligation and legal effect.' This was my deliberate judgment, pronounced and concurred in by my brethren of the Court of Appeals, Johnson and Harper, nearly fifteen years ago. It has received the entire sanction and acquiescence of the bench, the bar, the Legislature and the people, ever since. The most distressing cases, justifying divorce even upon Scriptural grounds, have been again and again presented to the Legislature, and they have uniformly refused to annul the marriage tie. They have nobly adhered to the injunction, 'Those whom God has joined together let not man put asunder.' The working of this stern policy has been to the good of the people and of the State, in every respect. With this knowledge before us, can an act granting a divorce *a vinculo matrimonii*, be presumed? Mr. Best, in his second chapter, section 61, page 74, under the maxim: '*Omnia præsumuntur rite esse acta*,' says: 'The extent to which courts of justice will presume in support of acts, depends very much on whether they are favored or not by law.' This being, as I think,

¹ 1 Hm, 10.

the true notion of the application of the maxim, I am clearly of the opinion that an act granting a divorce can, under no circumstances, be presumed from lapse of time."

RULE 88. — When a person is in possession of property and is shown entitled to the beneficial ownership thereof, the presumption is that every instrument has been executed, and every thing has been done to render his title legal.¹

Illustrations.

I. A person has possession of a deed. This raises a presumption of its legal delivery to him.²

II. A partition of land is presumed from possession and lapse of time.³

X III. A long possession of land by the grantor acquiesced in by the grantee is shown. The presumption is that it was for a breach of condition.⁴

IV. A. enters into possession of land under a conveyance from B. A.'s title is presumed good till the contrary is shown.⁵

V. A voluntary division of property is made by heirs in 1880. In 1860 an administration will be presumed.⁶

VI. A. has been in possession of land for twenty years under an administration deed. The presumption is that all the legal formalities of the sale were observed.⁷

VII. The regularity of a sale under a power is presumed from lapse of time.⁸

VIII. A sale of land is made by an agent. It is presumed to be made under a power which is lost after a lapse of time.⁹

¹ So recitals in deeds are presumptive evidence of pedigree (*Little v. Palister*, 4 Me. 209 (1826); and of the deeds referred to after a lapse of time. *Fuller v. Saxton*, 20 N. J. (L.) 61 (1843); *Den v. Gaston*, 25 N. J. (L.) 615 (1856).

² *Roberts v. Swearingen*, 8 Neb. 363 (1879); *Fairlee v. Fairlee*, 21 N. J. (L.) 284 (1848); *Perry v. Anderson*, 22 Ind. 36 (1864).

³ *Goodman v. Winter*, 64 Ala. 410 (1879); *Baker v. Prewitt*, 64 Ala. 551 (1879).

⁴ *O'Brien v. Henry*, 6 Ala. 787 (1844).

⁵ *Pitney v. Leonard*, 1 Paige Ch. 461 (1829).

⁶ *Desverges v. Desverges*, 31 Ga. 753 (1861); *Austin v. Bailey*, 37 Vt. 219 (1864).

⁷ *Winkley v. Kalme*, 32 N. H. 266 (1855); *Coxe v. Deringer*, 78 Pa. St. 271 (1875).

⁸ *Simson v. Eckstein*, 22 Cal. 580 (1863).

⁹ *Forman v. Crutcher*, 2 A. K. Marsh. 70 (1819); *Delabigarre v. Second Municipality*, 3 La. Ann. 230 (1848).

RULE 89.—And the possession of personal property raises a presumption of title in, and ownership of, the property by the possessor.¹

Illustrations.

I. The plaintiff and defendant claimed property in a certain slave. The trial judge instructed the jury that if they found certain facts the plaintiff should have a verdict, "even should they believe from the evidence that defendant and his father under whom he claimed held possession of the slave, * * * for twenty years, claiming him openly as their own property." *Held*, erroneous.²

II. A. is in possession of a vessel. The presumption is that he owns it.³

III. B. has certain sheep in his possession. The presumption is that they are his.⁴

IV. In C.'s hands are a number of bonds. The presumption is that he owns them.⁵

V. A. has possession of a note. This presumes ownership in A. of that note.⁶

VI. A. claiming that a calf in the possession of B. is his, breaks into B.'s yard and takes it. The presumption is that it is B.'s property and the burden is on A. to show his right.⁷

VII. A. ships property by a carrier. The presumption is that A. owns the property.⁸

In case I., the Alabama cases on this topic were reviewed at length. "In this as in most States of this Union," said

¹ *Entikam v. Brown*, 30 Pa. St. 364 (1859); *Phelps v. Cutler*, 4 Gray, 137 (1855); *Park v. Harrison*, 8 Humph. 413 (1847); *Burdge v. Smith*, 14 Cal. 380 (1859); *Goodwin v. Garr*, 8 Cal. 615 (1857); *Hunt v. Uiter*, 15 Ind. 315 (1860); *Evans v. Board of Trustees*, 15 Ind. 319 (1860); *Robinoe v. Doe*, 6 Blackf. 85 (1841); *Millay v. Butts*, 35 Me. 139 (1853); *Linscott v. Trask*, 35 Me. 150 (1853). "No principle is more fully settled by the uniform weight of authority than that possession is *prima facie* evidence of title, and that upon proof of that fact the party proving it is entitled to vindicate any violation of his rights thus established. Possession, indeed, may be considered the primitive proof of title and the natural foundation of right." *Id.*

² *McArthur v. Carrie*, 32 Ala. 76 (1850).

³ *Stacy v. Graham*, 3 Duer, 464 (1856); *Bradley v. The New World*, 2 Cal. 273 (1852).

⁴ *Fish v. Skut*, 21 Barb. 333 (1856).

⁵ *Wickes v. Adirondack Co.*, 4 Thomp. & C. 250 (1874).

⁶ *Donnel v. Thompson*, 13 Ala. 440 (1846); *Bush v. Seaton*, 4 Ind. 523 (1853); *Kimball v. Whitney*, 15 Ind. 280 (1860); *Squier v. Stockton*, 5 La. Ann. 120 (1860).

⁷ *Cumberland v. Cole*, 44 Iowa, 181 (1876).

⁸ *Price v. Powell*, 3 N. Y. 323 (1850).

the court, "there is a growing disposition to fix a period, beyond which human transactions shall not be open to judicial investigation, even in cases for which no statutory limitation has been provided. This period is sometimes longer, and sometimes shorter, dependent on the nature of the property, and the character of the transaction. By common consent, twenty years have been agreed upon, as a time at the end of which many of the most solemn transactions will be presumed to be settled and closed.¹ The nature of this presumption, and the manner of drawing it, are not, in the mother country, and in the several States, the same.² The precise question we are considering does not appear to have been before considered in this court. Kindred questions have been under review. In *Rhodes v. Turner and Wife*,³ an effort was made to bring an administrator to a settlement after a great lapse of time. Chilton, J., employed the following very pointed language: 'If a final judgment has been rendered, according to the principles of the common law, it would be presumed to have been paid after the expiration of twenty years; and if the parties allow this period to elapse without taking any steps to compel a settlement, we think the presumption of payment arises, and the executor or administrator should be exempted from the necessity of hunting up evidence to prove accounts and vouchers which ordinarily enter into such settlement.' In *Barnett v. Torrance*,⁴ a settlement has been attempted; but it was so defective that under our decisions, it could not be regarded as a final settlement. More than twenty years afterwards the administrator was cited to a final settlement, and he was sought to be charged with assets for which he had never accounted. This court, deciding that it would presume, after so great a lapse of

¹ See 2 Story's Equity, 1028 a.

² See, on this subject, Cowen & Hill's notes to Phill. Ev. (Edition by Van Cott), Part I., pp. 536, 456, 497, 464, 486 to 500, 504-505; vol. 5, same edition, 287; Sims v. Aughtery, 4 Strob. Eq. 103.

³ 21 Ala. 210.

⁴ 23 Ala. 463.

time, in favor of the correctness of that settlement, that the necessary notices were given, and that the parties in interest were present, proceeded to remark, that 'a decree, rendered under such circumstances, is binding on the parties to it until it is reversed in the proper court. * * * The executors can not now be called upon in the Probate Court to go into a settlement again, when all parties have reposed on that already made, for so long a period that it is fair to presume that much of the proof which was then obtainable could not now be commanded.' In further considering this presumption, the court added: 'We have carefully examined the ground on which the rule here suggested is founded, and are thoroughly convinced its adoption is essential to the safety and repose of executors, administrators, and guardians, and to the advancement of the ends of common justice. It is strictly analogous to the rule at common law in relation to judgments, and more liberal than the rule in equity with respect to stale claims.' The case of *Gantt's Admr. v. Phillips*,¹ was a suit by an administrator *de bonis non*, to recover a slave, the title to which, it was alleged, had never passed out of the estate. The defendant, and those under whom he claimed, had been in the adverse possession of the property for more than twenty years. The record of the Orphan's Court did not show that the person named as executrix of the will had ever qualified. If she had not qualified then there could have been no assent to the legacy—the slave was still a part of the estate of the testator, and the plaintiff was entitled to recover. The Circuit Court charged the jury, that record of her appointment as executrix would be the highest and best evidence of the fact; but if the proof showed to their satisfaction that the appointment and qualification of said Elizabeth Gantt as executrix had been duly made, and that in the lapse of time the papers and records of the appointment had been

¹ 23 Ala. 275.

lost or destroyed, then the jury might presume her appointment and qualification. The latter part of this charge was assigned as error. This court, after collating and commenting on many decisions of other courts, said: 'Under the circumstances, we consider the court left the question to the jury quite as favorably as the plaintiff was authorized to demand.' The judgment was affirmed. In *Harvey v. Thrope*,¹ a similar decision was made.² It will be observed, that in the case cited from our own reports of *Barnett v. Torrance*, the presumption drawn by the court in favor of the regularity and validity of the decree was conclusive, not a mere *prima facie* intendment, liable to be overturned by proof. To the same effect is the principle announced in *Rhodes v. Turner and Wife*.³ These were proceedings against administrators, for wasting, misapplying, and not accounting for assets of the estates they represented. Under the authority of those cases, if an administrator has converted to his own use, or privately sold, the property of the estate, and has not been proceeded against for the conversion until the expiration of twenty years after the time when he should have settled the estate he is forever discharged, on a mere presumption of law. Suppose, after that time an administrator *de bonis non* should be appointed, and should sue the purchaser for property which the administrator in chief had sold to him privately, or without an order. The law would presume, in favor of the faithless administrator in chief, that he had accounted and settled for the property, although the record might show nothing on the subject. If the purchaser, under these circumstances, should be held accountable for this identical property, would not the law present a strange anomaly? Applying these principles to the case at bar, Mrs. Cavin, in 1853, when this suit was brought, could not, under our decisions, be made to account for the conversion or *devastavit* of these slaves. Can Mr. Arthur be made to account

¹ 28 Ala. 260.² *Lay v. Lawson*, 28 Ala. 377.³ *Supra*.

for them? In the cases of *Gantt v. Phillips* and *Harvey v. Thrope*, the question, whether the presumption was conclusive or not, was not presented by the record, and was not discussed. We do not regard them as authorities against the principle announced in *Rhodes v. Turner and Wife* and *Barnett v. Torrance*.¹ There is an able discussion of this question in the case of *Sims v. Aughtery*.² That case, in its legal bearings, was strikingly like the present. The circuit decree was pronounced by Chancellor Dunkin, who, quoting from a former decision, used the language that, 'the lapse of twenty years is sufficient to raise the presumption of almost anything that is necessary to quiet the title of property. If there had been no will and no administration, administration would nevertheless be presumed, and that defendants had acquired a title from the administrator. * * * After a possession of twenty-five years, the court will presume a sale by the executor for the purpose of paying the debts, an administrator *de bonis non* after Lyle's death, and a sale by such administrator, or almost anything else, in order to quiet the long possession.' In the Court of Appeals the opinion was delivered by Chancellor Dargan. The profession is referred to it as an elaborate vindication of this doctrine. After copying the language of Chancellor Dunkin, last above quoted, he adds: 'This is strong language, but not stronger than is warranted by the authorities, or demanded by a stern and imperative public policy. In regard to property not the product of manual labor, there is, perhaps, no title extant in any part of the world, that could withstand the searching scrutiny of justice, and which if traced to its origin, would not be found based upon fraud, rapine, spoliation, or conquest.' After adverting to the statutes of limitation as one means of giving repose to stale subjects of litigation, he proceeds to remark: 'We have another system of rules, founded upon what is called the doctrine of legal

¹ *Supra*.

² 4 Strob. Eq. 102.

presumptions, which prevail alike in courts of law and equity, and which are eminently subservient to the quieting of titles, and the prevention of litigation arising upon obscure and antiquated transactions. If these legal presumptions require a longer period than statutory bars to acquire force and effect, they are more general in their operation. They are highly conducive to the peace of society and the happiness of families; and relieve courts from the necessity of adjudicating rights so obscured by time and the accidents of life, that the attainment of truth and justice is next to impossible. * * * These legal presumptions, by which conflicting claims and titles are set at rest, I have endeavored to show are natural and necessary. They spring spontaneously out of the institutions and relations of property. As to the precise time at which they arise, each independent community must judge for itself. We have adopted the law of the mother country. In South Carolina, as in England, by the lapse of twenty years without admissions, specialties and judgments are presumed to be satisfied, and trusts discharged. 'Twenty years' continued possession will raise the presumption of a grant from the State, of deeds, and wills, administrations, sales, partitions, decrees, and (the chancellor has said) of almost anything that may be necessary to the quieting a title, which no one has disturbed during all that period.'¹ In examining the numerous authorities on this question, to be found in the reported cases of trials at law, the profession will frequently encounter the declaration, that from this lapse of time, the jury are *authorized* to draw the presumption which we have been considering. By this we understand, that the question is at all times one for the jury; a presumption they *may* draw, but there are no rules which govern them in such cases. Such was the instruction of the Circuit Court in the case of *Gantt v. Phillips*, and

¹ See, also, the case of *Williamson v. Williamson*, 1 Johns. Ch. 488, 492-493.

in the case of *Harvey v. Thrope*.¹ Now, with all due deference, we confess ourselves unable to perceive any solid reason on which to rest such a principle. We think it is at war with the analogies of the law, and with the theory of jury trials. Juries are authorized to pronounce on the credibility of witnesses; to determine disputed facts; to draw conclusions from doubtful and contradictory premises; and to admeasure damages when the law has afforded no standard. We do not say these are the only functions of a jury, but they are the controlling ones. Whenever the facts of the case are clear and uncontroverted, the rights of parties are, or should be, fixed and uniform. When there remains no fact to be found or conclusion to be drawn from contested and indeterminate premises, there is no use for a jury, for the law determines the rights of the parties. This principle is absolutely necessary, as the basis of a uniform system of jurisprudence. So, in cases where a jury trial is necessary, every proposition which stands forth clear and undisputed, and which rests on no inference to be drawn from disputable or controverted premises, is, or ought to be, a question of law. On this principle rests all our presumptions of law. It is not our purpose to deny to the jury the right and duty of determining whether in fact the twenty years have elapsed. That fact being found, however, and there being no contravailing proof, what reason can exist for leaving it to the discretion, possibly caprice, of the body, whether they will draw the desired conclusion? There is one naked fact, to wit, acquiescence for twenty years. There can be no reason for indulging the presumption in one case which does not exist in all others. Chancellors invariably draw the presumption from this one fact, and we think a rule equally uniform should prevail in courts of law. To lay down a different rule, will be to invite a contest and jury trial in every case thus circumstanced. The circumstances of each

¹ *Supra*.

case will be appealed to by opposing counsel, in the hope that they severally may impress the jury with the belief that it is their duty in the particular case to indulge or withhold the presumption, as the one or other result will promote their several interests. We are unwilling to declare a rule, the result of which may be to tempt juries from their propriety, to multiply litigation, and to increase the uncertainty which must always attend the administration of the law. We do not wish to be understood as saying that this presumption is always conclusive. In the first instance, perhaps, it never is so. In cases like the present, however, we hold that a *prima facie* presumption is raised, whenever there is satisfactory proof of twenty years' uninterrupted, adverse enjoyment and possession. Speaking of this presumption, Mr. Starkie says (edition of 1826, vol. 3, p. 1214), 'it gives to the evidence a technical efficacy beyond its simple force and operation.' On page 1224, he says, this is not a direct and immediate inference to be made by the courts [of law]; yet 'the court will under certain circumstances, direct a jury to presume an outstanding term to have been surrendered by the trustee.' To the same effect is *Vandick v. Van Buren*.¹ This *prima facie* case may, of course be overturned. It can not be done by proving that the title was, in its inception, defective. Proof to be effectual for this purpose, must be addressed to the *character* of the plaintiff's possession, either in its *acquisition* or *use*; must tend to show possession is not inconsistent with the plaintiff's right; or that some other excuse independent of original defect of

¹ 1 Caines Rep. 84. See on this subject Cow. & Hill's Notes to Phil. Ev. (ed. by Van Cott), Part 1, pp. 486, *et seq.*; 2 Wend. Black. 266, note 10; Beck on Presumptions, 144; Smithpeter v. Ison, 4 Rich. Law, 208; 3 Bouv. Bacon, 621; Jackson v. McCall, 16 Johns. 377; 1 Greenl. Ev., sec. 46; Warren v. Webb, 2 Strange, 1129; Rex v. Carpenter, 2 Show. 47; Trotter v. Harris, 2 Younge & Jervis, 285; Beall v. Lynn, 9 Harr. v. Johns. 336, 353, 361; Ld Pelham v. Pickingill, 1 T. R. 881; Doe v. Ireland, 11 East, 280, 284; Goodtitle v. Baldwin, *Id.* 288; Penwarden v. Ohing, 1 Moody & Mal. 400; Rex v. Long Buckley, 7 East, 45; Mayor of Kingston v. Herwer, Cowp. 102, 110; Stodder v. Powell, 1 Stew. 187; 1 Greenl. Cruise, 415, 416; Rustard v. Gates, 4 Dana, 480; McPherson v. Cunliff, 11 S. & R. 423, 433.

title, must be given for the seeming long acquiescence. We cannot now be more definite. The record before us contains no excuse for the delay; and in such case, the *prima facie* presumption becomes conclusive. It results from this, that the charge of the circuit court was erroneous."

In case II. it was said: "The rule of law that possession of property is *prima facie* evidence of ownership is uniform in its application. The question of the ownership of a vessel forms no exception. In this case the vessel was in the possession and under the control of the master."

In case VI. it was said: "Proof of possession is presumptive proof of ownership. The plaintiff made a *prima facie* case by proof of possession. The presumption was not overcome by proof that the defendant afterwards acquired possession, because it appeared that he broke the plaintiff's enclosure, and took the calf from the plaintiff's possession. He could acquire no legal advantage thereby. Nor was the presumption in favor of the plaintiff overcome by the evidence as to the ownership prior to the taking of possession by the plaintiff, because the court finds that the evidence on the point is balanced."

T In *Moore v. Hawks*,¹ it was said: "With respect to personal chattels, possession alone is presumptive evidence of property, and with nothing to oppose it, is sufficient; and when the possession is accompanied with the exercise of complete acts of ownership for a length of time, it is strong evidence for the consideration of the jury, and requires satisfactory explanation. It is laid down in a late work, that if one should be in possession of a horse, which once belonged to his neighbor, for a considerable time, using him as his own, without any claim from his neighbor, it would be presumed there had been a sale, unless such neighbor could prove the contrary. And where a son is in possession of

¹ 2 Alk. (Vt.) 390 (1827).

property delivered him by his father to use gratuitously, although the relation between the parties may sufficiently explain the possession, and remove any presumption of fraud or ownership arising from that alone, yet it is said that if the father permits the son to sell and replace such property, or to exchange and manage it as though it was his own, this will be evidence that the loan was a mere cover for a gift with intent to deceive and defraud others."¹

¹ 1 Swift's Dig. 273, 766.



PART V.

PRESUMPTIONS IN CRIMINAL CASES.

(431)

CHAPTER XIX.

THE PRESUMPTIONS IN FAVOR OF INNOCENCE.

RULE 90. — The law presumes the innocence of a person charged with crime until the contrary is proved beyond a reasonable doubt.¹

Illustrations.

I. A man and woman live and cohabit together. The presumption is that they are married.²

¹ *People v. Thayer*, 1 Park. C. C. 595 (1835); *State v. Fugate*, 27 Mo. 535 (1858); *State v. Mosier*, 25 Conn. 40 (1856); *Warden v. State*, 18 Ga. 264 (1855). So a forfeiture will not be presumed. *State v. Atkinson*, 24 Vt. 448 (1852).

"THREE FAMOUS THINGS IN LAW."

"The presumption of innocence. It is greatly to be regretted that the so-called presumption of innocence in favor of the prisoner at the bar is a pretense, a delusion, an empty sound. It ought not so to be, but it is. Rufus Choate said that 'this presumption is not a mere phrase without meaning;' that 'it is in the nature of evidence for the defendant;' that 'it is as irresistible as the heavens till overcome;' that 'it hovers over the prisoner as a guardian angel throughout the trial;' that 'it goes with every part and parcel of the evidence;' that 'it is equal to one witness.' That is just what it should be, but just what is not. Practically it is of no avail whatever in the trial. The jury tread it under foot; the judge the same moment he admits it in theory, forgets it in argument. It is a dead letter. Nay, so far from being merely inoperative, it is not hazardous to say that in the trial the presumption is reversed. By court and jury, by prosecution, police, and by the public the accused is presumed guilty. Let every one, as he looks upon a prisoner in the dock, carefully inquire of himself and answer if this be not so. The reason is plain. The whole course of criminal procedure, from inception to close, is designed to shut out presumptions of innocence and invite presumptions of guilt. The secrecy of complaint-making at the magistrate's office, the mysterious inquisition of the grand jury room, the publicity of the arrest, the commitment to the lock-up, the demand of bail the delay of trial, the enforced silence of defense till prosecution has done its worst, are all so many steps and strokes to blacken the accused before he is permitted to open his mouth with a syllable of evidence to break the force of the damaging array of circumstances. To suppose that the presumption of innocence, which unbiased nature prompts, is not before this time choked and strangled to death is an absurdity too gross to dispute. The treatment itself of the prisoner negatives the presumption. If he is presumed innocent, why is he manacled? why is he put in jail? why is he let out only on bail? why, when he is put on trial, is he put in the dock? why does he not have place with the by-standers, who are simply presumed innocent? The 'presumption' in the presence of

² *Post v. Post*, 70 Ill. 484 (1873); *Cope v. Pearce*, 7 Gill (Md.), 263 (1848).

II. In 1840, marriages between whites and negro slaves are prohibited under penalty of fine and imprisonment. It is proved that a negro slave and a white woman lived and cohabited together. The presumption is that the relation was that of concubinage, and not of marriage.¹

such things, is a contradiction of terms. How can a person be presumed innocent who is presumably guilty? The fact that he is restrained of his liberty presumes guilt. There is no other construction to be placed on the restraint. Human nature is not capable of any other. Yet human nature ought to presume innocence till the contrary is proved. What then? Shall the mode or order of proceeding against suspected violators of law be so modified as to allow human nature to be thus generous? Can it be so modified? The object to be attained is worthy a good deal of experiment at the risk of a good deal of havoc of old time forms and proceedings.

"*The reasonable doubt.*" It would be a happy thing for the triers of criminal causes if somebody should succeed in defining a 'reasonable doubt.' A great felicity it would be if only some one should portray a reasonable doubt beyond a reasonable doubt. Nothing is more glibly spoken of than this doubt, yet there is nothing more doubtful. Lawyers roll it as a morsel under their tongues and roll it off at juries and justices as if it were a thing to be apprehended with as much certainty as a stark naked fact. But what a reasonable doubt is it is doubtful whether they stop to think, or, stopping, form any but a very doubtful opinion. Should it be a matter of opinion at all? Should it not be a matter of conviction? Should not every one who is to inquire whether he has it, have as absolute an idea of what a reasonable doubt is as he has of any other independent fact in the case? If the case is to turn on the matter of reasonable doubt, how can it turn aright, unless the turning-point be ascertained and fixed beyond a reason—beyond all question? The learning of the books on this subject is vast. It begins with the Bible—that is to say, the book writers make it begin there, though it does not appear that the inspired writers were sufficiently inspired to hit upon the favorite expression. Its equivalent, law-givers since the time of Moses, find in the Mosiac provision, which forbade the death penalty till the crime 'be told thee, and thou hast heard of it, and inquired diligently, and, behold, it to be true, and the thing *certain*' (Deut. xvii: 4). This is said to be the amplification of Moses as definer of the doubt. Modern authorities do not seem to have done much better. But it is not because they have not tried. One author says that 'the persuasion of guilt ought to amount to such a moral certainty as convinces the minds of reasonable men beyond *all reasonable doubt.*' But what is the reasonable doubt? Another says that 'a reasonable doubt may be described by saying that all reasonable hesitation in the mind of the triers, respecting the truth of the hypothesis attempted to be sustained, must be removed by the proof.' Another describes it 'as that degree of certainty upon which the jurors would act in their own grave and important concerns.' This seems to approach nearer a solution, and resembles a definition once heard in a charge to a jury. The judge who gave it is admittedly one of the ablest and clearest-headed jurists who ever sat upon the bench. He is the man whom Rufus Choate called 'one of the ablest minds of the State.' As near as memory serves, his words were as follows: 'Just what a reasonable doubt is, gentlemen, it is not quite easy to say; but you are practical men, and I instruct you that you should be satisfied of the defendant's guilt to that degree of certainty which you would require for your guidance in acting decisively in any grave matter of your own within such time as is ordinarily given to a jury for deliberation in the case.' Allowing this to be right instruction, is it not probable that many, very many, are convicted without proof beyond a reasonable doubt.

"*The burden of proof.*" This is another expression that should have a more fixed meaning. Like all other expressions used familiarly in discourse, it loses force and weight by its commonness. It plays a windy, wordy part in all argumentation on questions of fact. To the mind of the average hearer it assumes the likeness of a

¹ *Armstrong v. Hodges*, 2 B. Mon. (Ky.) 70 (1841).

III. M. was indicted for stealing a keg of beer; all that was proved was that M. had taken a keg of beer from a store. This is insufficient to raise a presumption that M. intended to steal it.¹

IV. A husband and wife separate, and the former lives and cohabits with another woman. The presumption is that he obtained a divorce from his first wife, and she may legally marry again.²

V. A. marries B., having a husband, C., living. It being proved that C. subsequently died, the presumption is that A. and B. were married again after his death, if they are proved to have continued cohabitation.³

VI. A., being under the legal age, contracts a marriage with B.; the marriage is void. When A. came of age, B. was on her death bed and died three weeks thereafter. During that time they continued to live together and to be recognized as husband and wife. *Held*, that a marriage would be presumed to have taken place after A. came of age.⁴

VII. To sustain a plea of coverture, a defendant swore that she was married at a certain chapel on a certain day, and afterwards cohabited with her husband; the law required that to render a marriage valid the chapel in which it was solemnized should be licensed. *Held*, that the presumption was that the chapel in this case was duly licensed.⁵

harmless sort of puff ball, tossed hither and thither by cunning lawyers to mystify the case and the hearer, and, for about the same reason, the trier comes to treat it as not of much account. How often does the juror give it serious thought that the plaintiff is weighted with a burden which the defendant is not—that having asserted a thing he should show it to be fact by a *preponderance* of the evidence? Many reason that assertion must be true, otherwise it would not have been asserted. Some regard *ipse dixit* demonstration. They look upon denial as despair. To them, he who denies seems to be in a fix. They never get the better of the first impression of the first word. But the old Roman rule—the proof devolves on him who declares not on him who denies—is the American rule, and there is no rule that ought to be more rigidly enforced in court or out of court. A righteous rendering of it would be, let him who can not make good what he would assert, hold his peace or hold forth at his peril. Then there would be less holding forth. There is too much holding forth. Too much there is of heedless, wanton allegation and accusation of a legal sort and of all sorts. Rights are rated too low. Reputation is reckoned too cheap. It is painful to relate that the law holds reputation in very cheap estimation. Criminal procedure everywhere is a standing invitation to attack it at the public expense, and civil procedure affords no adequate remedy when it is attacked and damaged. A suit for libel or slander, however well grounded in law, generally leaves the aggrieved man worse off than when he invoked the law's aid. Before he can get a trial the slander has done its worst, and before he can get a verdict he has spent thrice the money the law gives him to right the wrong he has suffered." From *Ten Years a Police Court Judge*. New York: Funk & Wagnalls, 1894

¹ *Mason v. State*, 33 Ark. 239 (1877).

² *Blanchard v. Lambert*, 43 Iowa, 228 (1876).

³ *Blanchard v. Lambert*, 43 Iowa, 228 (1876); *Yates v. Houston*, 3 Tex. 433 (1848); *Carroll v. Carroll*, 20 Tex. 731 (1858); *Fenton v. Reed*, 4 Johns. (N. Y.) 51; *Rose v. Clark*, 8 Paige (N. Y.) 573; *Jackson v. Claw*, 18 Johns. (N. Y.) 347.

⁴ *Wilkinson v. Payne*, 4 T. R. 468 (1791).

⁵ *Sichel v. Lambert*, 15 C. B. (N. S.) 781 (1864).

VIII. In an action by A. against B., A. alleged that B., who had chartered his ship, had put on board a dangerous commodity by which a loss happened, *without due notice to the captain* or any other person employed in the navigation. The burden of proving that B. did not give the notice was on A.¹

IX. A railroad company is authorized to construct a railroad in a public street, with necessary switches and turn-outs; it makes certain switches which, it is alleged, are a nuisance. The presumption is that they are necessary, and the burden is on the one complaining of the nuisance.²

X. A physician is employed to treat A.'s wife and children. In a suit for his services it will be presumed that the visits for which he charges were necessary.³

XI. A statute required that the taking of the sacrament should be a prerequisite to holding a certain office. The presumption is that a person holding such office has qualified in this manner.⁴

XII. An insolvent exhibits an account of his debits and credits under oath. The presumption is that it is a true account, and not that he has committed perjury.⁵

XIII. The action is for the malicious prosecution of the plaintiff without probable cause. The burden of proving the absence of probable cause is on the plaintiff.⁶

XIV. A statute provides that no justice of the peace shall hear any examination in any bar-room where spirituous liquors are sold; a justice holds an examination in a bar-room. It will not be presumed that spirituous liquors were sold there.⁷

In case I., if the inference should be that they were not married, there must be an inference that they were living in unlawful relations. "The mere cohabitation of two persons of different sexes, or their behavior in other respects as husband and wife, always affords an inference, of greater or less strength, that a marriage has been solemnized between them. Their conduct being susceptible of two opposite explanations, we are bound to assume it to be moral rather than immoral."

¹ Williams v. East India Co., 3 East, 104 (1802).

² Carson v. Central E. Co., 35 Cal. 325 (1868).

³ Todd v. Myers, 40 Cal. 355 (1870).

⁴ King v. Hawkins, 10 East, 211 (1809).

⁵ Hewlett v. Hewlett, 4 Edw. (N. Y.) 7 (1839).

⁶ Lavender v. Hudgens, 33 Ark. 764 (1878).

⁷ Savier v. Chipman, 1 Mich. 116 (1848).

In case II., the presumption is that the parties were not married, because, if they were, they were guilty of violating the express words of a penal statute.

In case III., "the law presumes in favor of innocence and of a good motive rather than a bad one, and the burden was not upon the defendant to show that he had no criminal intent in taking the beer, but it devolved upon the State to prove that he had."

"We have here," said Keating, J., in case VII., "the fact of a religious ceremony having been performed by a minister of religion in a place of public worship. All that is required to make the marriage a strictly valid marriage is that the place where the ceremony was performed was duly licensed under the statute for the celebration of marriages, and that the registrar was present. The question is whether we may presume the existence of these two requisites. I think we may, consistently with all the doctrines of legal presumptions, fairly presume that the ceremony was properly and legally performed, seeing that if it were otherwise the officiating clergyman would have been guilty of felony."¹

It was argued in case VIII., that to compel A. to prove the want of notice was compelling him to prove a negative, which, in a civil action at least, was against the general rules of evidence. But Lord Ellenborough said: "That the declaration, in imputing to the defendants the having wrongfully put on board a ship, without notice to those concerned in the management of the ship, an article of a highly dangerous, combustible nature, imputes to the defendants a criminal negligence, can not well be questioned. In order

¹ In *Reg. v. Mainwaring*, 1 Dears. & B. 133, a similar question arose upon an indictment for bigamy. "The presence of the registrar at the marriage," said Wightman, J., "the fact of the ceremony taking place, and the entry in the registrar's book, of which a copy was produced at the trial, seemed to me at the time to be circumstances which afforded, and I now think, aided as they are by the presumption *omnia rite esse acta*, they do afford *prima facie* evidence that the chapel was a duly registered place in which marriages might be legally celebrated. If it were not such a place, all those who took part in the proceedings would be criminally liable for doing so."

to make the putting on board wrongful, the defendants must be cognizant of the dangerous quality of the article put on board, and if, being so, they yet gave no notice, considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous article on board for which they are criminally liable and punishable as for a misdemeanor at least. We are therefore of opinion, upon principle and the authorities, that the burthen of proving that the dangerous article in question was put on board without notice rested upon the plaintiff alleging it to have been wrongfully put on board without notice of its nature and quality."

Where the facts of a case are consistent both with honesty and dishonesty, a judicial tribunal will adopt the construction in favor of innocence.¹ To make out the guilt of a person charged with crime, the prosecution is required to prove every material allegation and every ingredient of the crime. The accused is presumed innocent until this is done.² Even in a civil action, where a question arises the determination of which involves the establishment of the fact that either party has been guilty of a criminal act, the other party, in order to obtain a determination of such question in his favor, must overcome, by a fair balance of testimony, not only the evidence introduced by the party so charged, but also the legal presumption of innocence which exists in every case.³

Other instances and applications of the presumption of innocence may be noted. Thus, it is a legal presumption that a criminal act done by a wife in the presence of her husband is done under his coercion; ⁴ a person under the age of seven years is conclusively presumed incapable of crime; while a person between the ages of seven and fourteen is

¹ *Greenwood v. Lowe*, 7 La. Ann. 197 (1852).

² *Horne v. State*, 1 Kan. 43 (1862).

³ *Bradish v. Bliss*, 35 Vt. 326 (1863).

Commonwealth v. Butler, 1 Allen, (Mass.) 4 (1861) ante, p. 373.

presumed incapable of crime; but this latter presumption may be shown, in a particular case, to be incorrect.¹ From the fact that two oaths have been made by the same person on the same subject, both of which can not be true, no presumption arises that either of them was willfully or corruptly made.² There is no presumption of law that every one present at a riot, and not actually aiding in its suppression, is guilty unless he proves his non-interference;³ and it has been held that the fact that three or more persons, in a violent manner, beat another, does not raise a presumption of law that they assembled with that intent, or, after being assembled, agreed mutually to assist one another in executing such purpose.⁴ And it has been held that where a statute gives one accused of crime the privilege of testifying or not on his preliminary examination, the fact that he gives no evidence on his examination can not be shown on the trial as a presumption against his innocence.⁵ Where, by statute, a woman is capable of contracting marriage at the age of fourteen, there is no presumption that a married woman is over fifteen.⁶ The presumption is that an agent has done his duty, until the contrary is shown; misconduct or negligence will not, in the absence of proof, be presumed.⁷

✓ **Sub-Rule 1. — *Fraud is never presumed, unless such circumstances are shown as will legally justify such an inference.***

Illustrations.

I. It was contended that a sale was fraudulent; the court instructed the jury that "it was necessary that the defendant should adduce stronger proof to establish fraud than to prove a debt or a sale; that the presumption was that every man acted honestly and without fraud, and when fraud was alleged the proof must not only be sufficient to establish

¹ *State v. Goin*, 9 Humph. (Tenn.) 175 (1845) *ante*, p. 373.

² *Schulter v. Merchants' Mutual Ins. Co.*, 62 Mo. 289 (1876).

³ *State v. McBride*, 19 Mo. 239 (1853).

⁴ *State v. Kempf*, 26 Mo. 429 (1858).

⁵ *Templeton v. People*, 37 Mich. 501 (1873).

⁶ *Bruce v. Atkinson*, 23 Ark. 363 (1869).

Gaither v. Myrick, 9 Md. 118 (1856).

an innocent act, but to overcome the presumption of honesty." *Held*, proper.¹

II. In an action for deceitfully exchanging property it was alleged that A., one of the parties, had notice of the adverse claim at the time of the exchange. The burden was not on A. to show that he had no notice.²

III. To remove the bar of the statute of limitations from a claim against a testator's estate, the plaintiff proves a receipt of part payment, signed by him, which was found in the testator's room. The mere fact that the plaintiff was seen in that room alone would not justify the inference that he fraudulently placed his receipt among the testator's papers.

IV. A mortgage being alleged fraudulent, the burden of showing this to be so is on the complainant.⁴

V. A law allowed an administrator commissions on the money in his hands, except where he failed to make annual reports to the ordinary; in proceedings in which it was charged that an administrator was not entitled to money which he claimed as commissions, the burden of showing that he did not make the required returns is on the complainant. The presumption is that he did his duty.⁵

In *United States v. McLean*,⁶ which was a proceeding to forfeit a vessel for acts done in violation of an act of Congress, Mr. Justice McLean thus expressed himself regarding the extent and policy of the presumption of innocence: "The object of the prosecution is to enforce a forfeiture of the vessel and all that pertains to it, for a violation of the revenue law. This prosecution, then, is a highly penal one, and the penalty should not be inflicted unless the infractions of the law shall be established beyond reasonable doubt. That frauds are frequently practiced under the revenue laws can not be doubted, and that individuals who practice these frauds are exceedingly ingenious in resorting to various subterfuges to avoid detection is equally notorious; but such acts can not alter the established rules of evidence which have been adopted, as well with reference to the pro-

¹ *Hatch v. Bayley*, 12 Oush. 37 (1863).

² *Patee v. Pelton*, 48 Vt. 183 (1876); and see *Hibbard v. Mills*, 46 Vt. 243 (1873).

³ *Carroll v. Quynn*, 18 Md. 379 (1868).

⁴ *Price v. Gover*, 40 Md. 103 (1874).

⁵ *Gee v. Hicks*, Rich. (S. C.) Eq. Cas. 5 (1831).

⁶ 9 Pet. (U. S.) 683 (1835).

tection of the innocent as the punishment of the guilty. A view of the evidence in this case must create a suspicion of fraud in the mind of every one who reads it with attention. * * * But are not the facts consistent with an innocent motive? And if a fair construction of the acts and declarations of an individual do not convict him of an offense — if the facts may be all admitted as proved and the accused be innocent, should he be held guilty of an act which subjects him to the forfeiture of his property on mere presumption? He may be guilty, but he may be innocent. If the scale of evidence does not preponderate against him, if it hang upon a balance, the penalty can not be enforced. No individual should be punished for a violation of law which inflicts a forfeiture of property unless the offense shall be established beyond reasonable doubt. This is the rule which governs a jury in all criminal prosecutions, and the rule is no less proper for the government of the court when exercising a maritime jurisdiction.” “It is certainly true,” said Mr. Justice Story, delivering the judgment of the Supreme Court in another case,¹ “that length of time is no bar to a trust clearly established, and in a case where fraud is imputed and proved, length of time ought not upon principles of eternal justice to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practiced is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant ample and decisive relief. But length of time necessarily obscures all human evidence, and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates, by way of presumption, in favor of innocence and against imputation of fraud. It would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real

¹ *Prevost v. Gratz*, 6 Wheat. (U. S.) 481 (1821); 1 Pet. C. C. 364 (1816).

or apparent, with which it may be encumbered. The most that can fairly be expected in such cases, if the parties are living, from the frailty of memory and human infirmity, is that the material facts can be given with certainty to a common intent, and if the parties are dead and the cases rest in confidence and in parol agreements, the most that we can hope is to arrive at probable conjectures and to substitute general presumptions of law for exact knowledge. Fraud or breach of trust ought not lightly to be imputed to the living, for the legal presumption is the other way, and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes and violate the sanctity of the grave, unless the evidence of fraud be clear beyond a reasonable doubt."

Sub-Rule 2. — *And good character is presumed.*¹

In *Harrington v. State*² it was said: "The court in effect instructed the jury that the law required less weight to be given to such evidence than if the accused were on trial for a crime of a lower grade. The weight that ought to be given to proof of good character does not depend upon the grade of the crime, but rather upon the cogency and force of the evidence tending to prove the charge, and the motives shown to exist for the commission of the crime by the accused. The presumption of innocence which is raised by such proof varies in force with the circumstances, but not, we apprehend, with the grade of the offense irrespective of the circumstances. The charge is substantially taken from that given to the jury by Chief Justice Shaw in the case of *Commonwealth v. Webster*.³ That case was peculiar in its circumstances; and we may here remark, that it is unsafe, as a general rule, and often calculated to mislead, to adopt a charge prepared for a particular case, and give it, as a rule

¹ *People v. Johnson*, 61 Cal. 142 (1893).

² 19 Ohio St. 264 (1869).

³ 5 Cush. 324.

of law, to guide juries in weighing evidence in other evidence dissimilar in that circumstance. The distinction taken in *Webster's Case*, as to the weight that may be given to proof of good character, between cases where the charge is for a crime of a higher, and where it is of a lower grade, we have not found recognized in any other case; while its correctness has been denied by the Court of Appeals of New York.¹ The indictment in *Cancemi's Case* was for murder, and the instruction of the court below to the jury was the same as that given in *Webster's Case*. The instruction was held to be erroneous, and to constitute ground for reversing the judgment. The reasonable effect of proof of good character is to raise a presumption that the accused was not likely to have committed the crime with which he is charged. The force of this presumption depends upon the strength of the opposing evidence to produce conviction of the truth of the charge. If the evidence establishing the charge is of such a nature as not, upon principles of reason and good sense, to be overcome by the fact of good character, the latter will, of course, be unavailing and immaterial. But the same will be true of any other fact or circumstances in evidence, which after receiving its due weight, does not alter the conclusion to be drawn from the other evidence in the case. Good character is certainly no excuse for crime; but it is a circumstance bearing indirectly on the question of the guilt of the accused, which the jury are to consider in ascertaining the truth of the charge. Hence it has been held, and we think correctly, that it is error for the court, in a criminal case, to charge the jury, that "in a plain case, a good character would not help the prisoner but in a doubtful case, he had a right to have it cast in the scales, and weighed in his behalf."² The true rule was said to be, 'that the testimony is to go to the jury, and be considered by them in connection with all the other facts and circumstances; and if they believe the

¹ *Cancemi v. People*, 16 N. Y. 501.

² *State v. Henry*, 5 Jones (N. C.), 66.

accused to be guilty, they must so find notwithstanding his good character.' ”

The presumption of innocence of one crime may convict a person of another and a greater one. *Gibson v. State*¹ is an interesting case of this kind. G. was indicted for bigamy, and it was shown in evidence that he had married one Maria in 1855, and Ann in 1857, Maria being then living. It was also shown that Maria had been married in 1849 to one E., who, a few months afterwards, disappeared, and at the date of the marriage between G. and Maria he had been missing a little over five years. It was held that E. would be presumed to be dead at the time of the marriage between G. and Maria, otherwise G. would have been guilty of adultery, though the effect of this presumption was to render G. guilty of bigamy by making the first marriage valid. “The point of inquiry,” said the court, “is whether his marriage to Maria was legal. The presumption of law is that it is. The effect of the statute is to make it legal as to her unless her husband were then alive, and the presumption is that he was dead. It must also be presumed to be valid as to him under the circumstances, for it can not be presumed to be valid as to one party and held to be void as to the other, for that would be to render him guilty of adultery for cohabitation with a woman whose marriage with him was, as to her, presumed to be legal and valid until the contrary was shown, which would be absurd. The law presumes the marriage to be valid as to him, and, in opposition to that presumption, without evidence destroying it, he can not be heard to allege that it was illegal, in order to avoid the punishment of his crime in abandoning the duties which he thereby assumed, and contracting marriage with another woman. Nor is he permitted to complain that the presumption of the legality of his former marriage is to be used for the purpose of convicting him of the crime of his subsequent marriage. The presumption is

¹ 28 Miss. 312 (1860).

one of innocence, which he can not complain of because he subsequently committed a crime, in relation to which the presumption in the former case operates against him."

RULE 91. — A *prima facie* case does not take away from a defendant a presumption of innocence.¹

The jury are not to convict unless the evidence is such as to lead them to believe that the prisoner is guilty. They may be instructed that it is the duty of the prisoner to explain facts and circumstances proved against him consistently with his innocence. But if he fails to do so the jury are not bound to convict him unless, on the whole evidence, they believe him guilty. Therefore it is improper to instruct them that any facts and circumstances which may be proved against him place the burden on him of proving his innocence.

Illustrations.

I. In a criminal prosecution the jury were instructed that when the government made out a *prima facie* case, it was then incumbent on the defendant to restore himself to that presumption of innocence in which he was at the commencement of the trial. *Held*, error.²

II. On an indictment for forgery in uttering a money order, the jury were instructed that "if it was proved that the order came into the hands of the defendant unaltered and came out of his hands altered, the burden of proof was on the defendant to prove that he did not alter it." *Held*, error.³

III. On a trial for murder it appeared that the house in which it was committed had been subsequently set on fire to conceal the crime. The jury were instructed that if the prisoner might have been at the scene of the fire the *onus* was cast upon her to get rid of the suspicion thus cast upon her. *Held*, error.⁴

In case I. it was said: "We are apprehensive that the distinction between a *prima facie* case, which is sufficient to call upon the defendant to go into his defense and

¹ Commonwealth v. Dana, 2 Metc. (Mass.) 339 (1841).

² Commonwealth v. Kimball, 24 Pick. (Mass.) 373 (1837).

³ State v. Flye, 26 Me. 312 (1846); State v. Tibbets, 35 Me. 81 (1852).

⁴ People v. Bodine, 1 Den. (N. Y.) 281 (1846).

encounter such *prima facie* case, and the changing the burden of proof, was not sufficiently considered and observed in this case. Making out a *prima facie* case does not necessarily or usually change the burden of proof. A *prima facie* case is that amount of evidence which would be sufficient to counterbalance the general presumption of innocence and warrant a conviction, if not encountered and controlled by evidence tending to contradict it and render it improbable or to prove other facts inconsistent with it. But the establishment of a *prima facie* case does not take away from a defendant the presumption of innocence, though it may, in the opinion of a jury, be such as to rebut and control it; but that presumption remains, in aid of any other proofs offered by the defendant, to rebut the prosecutor's *prima facie* case. The court are of opinion that the jury should have been instructed that the burden of proof was upon the commonwealth to prove the guilt of the defendant—that he was presumed to be innocent unless the whole evidence in the case satisfied them that he was guilty.”

In case II. it was said: “The prosecuting party is bound to make out his case, in civil proceedings, to the satisfaction of the jury, and, in criminal proceedings, beyond a reasonable doubt. The burthen of proof does not shift from the party upon whom it was originally thrown upon the production of evidence by him sufficient to make out a *prima facie* case. But when the other party relies upon facts to establish another and distinct proposition, without attempting to impugn the truth of the evidence against him, it is otherwise. If the result of the case depends upon the establishment of the proposition of the one on whom the burthen was first cast, the burthen remains with him throughout, though the weight of evidence may have shifted from one side to the other according as each may have adduced fresh proof.”

In a criminal trial, if the prosecution fails to make out a *prima facie* case, the fact that the defendant produces no

evidence to negative an averment which the prosecution is bound to prove will not warrant the jury in finding that indictment proved.¹ “ In a criminal case the establishment of a *prima facie* case does not, as in a civil case, take away from the defendant the presumption of innocence or change the burthen of proof. A solid reason for the distinction is the well known difference in the *measure of proof* in the two classes of cases. In a civil case the plaintiff is not required to prove beyond all reasonable doubt the facts on which he relies for a recovery, and therefore when he establishes a *prima facie* case the burthen of proof is thereby shifted, and the *prima facie* case so established entitles him to recover unless it is destroyed by proof from the other party. But in a criminal case the State is required to prove beyond all reasonable doubt the facts which constitute the offense. The establishment, therefore, of a *prima facie* case, merely, does not take away the presumption of innocence from the defendant, but leaves that presumption to operate in connection with or in aid of any proofs offered by him to rebut or impair the *prima facie* case thus made out by the State. A circumstance, aided by that presumption, may so far rebut or impair the *prima facie* case as to render a conviction upon it improper.”²

RULE 92. — Where there are conflicting presumptions, the presumption of innocence will prevail against the presumption of the continuance of life (A), the presumption of the continuance of things generally (B), the presumption of marriage (C), the presumption of chastity (D). But it is otherwise as to the presumption of knowledge of the law (E) and the presumption of sanity (F).

“ Nothing can be clearer than this,” says Mr. Justice

¹ Commonwealth v. Hardiman, 9 Gray (Mass.) 361 (1857).

² Ogletree v. State, 28 Ala. 638 (1856); United States v. Douglass, 2 Blatchf. (U. S.) 307 (1851).

Heath in an old case,¹ "a presumption may be rebutted by a contrary and stronger presumption."

Illustrations.

A.

I. Mary B. married W., who afterwards enlisted and went on a foreign service and was never heard of afterwards; twelve months after his departure she married B. *Held*, that the issue of B. would be presumed legitimate.²

II. Title was claimed through A. and B., his wife; it was proved that B. had been married to C., who was dead, and that she had had three husbands before she married A. The presumption was that these husbands were dead before she married A.³

In case I. the conflicting presumptions were the presumption of innocence and the presumption of the continuance of life. "If," said the court, "W. was alive at the time of the second marriage, it was illegal and she was guilty of bigamy. If she had been indicted for bigamy, it would clearly not be sufficient. In that case, W. must have been proved to have been alive at the time of the second marriage. It is contended that his death ought to have been proved, but the answer is that the presumption of law is that he was not alive when the consequence of his being so is that another person has committed a criminal act."⁴

¹ *Jayne v. Price*, 5 Taunt. 326 (1814).

² *King v. Inhabitants of Gloucestershire*, 2 Barn. & Ald. 386 (1819); *Lockhart v. White*, 18 Tex. 102 (1856); *Sharp v. Johnson*, 22 Ark. 79 (1860); *Greensborough v. Underhill*, 12 Vt. 604 (1839); *Cameron v. State*, 14 Ala. 546; 48 Am. Dec. 111 (1848); *Chapman v. Cooper*, 5 Rich. (L.) 432 (1853); *Yates v. Houston*, 3 Tex. 442 (1848).

³ *Breiden v. Paff*, 12 S. & R. (Pa.) 430 (1825).

⁴ The case which is often cited in connection with *King v. Inhabitants of Gloucestershire*, is *King v. Inhabitants of Harborne*, 2 Ad. & E. 540 (1835). There it appeared that one Ann Smith had, on April 11th, 1831, been married to one Henry Smith, who deserted her. Smith had been previously married in October, 1821, to another female with whom he lived until 1823, when he left her. But several letters had been received from her from Van Dieman's Land, one of which bore date only twenty-five days previous to the second marriage. The court held that the presumption was that the first wife was living at the time of the second marriage. The decision in this case was evidently based on the very short time which transpired between the time when the first wife was shown to be alive and the date of the second marriage. And see *Lapsley v. Grierson*, 1 H. L. Cas. 500 (1848). In *Yates v. Houston*, 3 Tex. 433 (1848), where four years had elapsed since the former wife had

In case II. it was said: "In an old transaction like this, the fact of a second marriage is of itself some evidence of the death of the former husband. There are sometimes cases where it is unavoidably necessary to decide on the existence of facts without a particle of evidence on either side, and if a decision in a particular way would implicate a party to a transaction in the commission of a crime or any offense against good morals, it ought to be avoided, for the law will not gratuitously impute crime to any one, the presumption being in favor of innocence till guilt appear." In a Massachusetts case it was said: "The presumption of the wife's innocence in marrying again might well overcome any presumption that a man not heard from for four years before the second marriage, or for sixteen years afterwards was alive and was her lawful husband when she married the second time."¹

B.

I. A. and B., as husband and wife, sue C. for slander; they prove their marriage, but C. proves declarations of the wife that she had been married in Germany to another man. It will be presumed that the previous marriage has been dissolved by death or divorce.²

II. A. threatens to kill B.; some time after B. kills A. There is no presumption that A.'s intention continued to that time.³

III. A. was indicted for illegally selling liquor; it was proved that it was sold, in his absence, by his clerk. The fact that the clerk had previously made similar sales, which A. had approved, does not raise the presumption that the last sale was with his consent.⁴

been heard from, it was held that her death would be presumed to validate a subsequent marriage. And see *Lockhart v. White*, 18 Tex. 102 (1856). In *Wilkie v. Collins*, 48 Miss. 496 (1873), a husband left his home in Mississippi on October 30th, 1859, and went to Louisiana on business, where he was last heard from by letter to his wife, November 30th, 1859, announcing that he was then sick in bed, and would return as soon as he was able to travel. He was of habitual delicate health, and his domestic relations had always been most agreeable. It was the belief of his family that he was dead, and on December 23d, 1861, his wife married again. It was held that the husband would be presumed to have been dead at that time. And see *Chapman v. Cooper*, 5 Rich. (S. C.) L. 459 (1853).

¹ *Kelly v. Drew*, 13 Allen, 107 (1866).

² *Klein v. Landman*, 29 Mo. 259 (1860).

³ *State v. Brown*, 64 Mo. 367 (1877).

⁴ *Patterson v. State*, 21 Ala. 571 (1852).

In case I. it was said: "There was no presumption that a marriage which was proved to have existed at one time in Germany continued to exist here after positive proof of a second marriage *de facto* here. The presumption of law is that the conduct of parties is in conformity to law until the contrary is shown. That a fact continuous in its nature will be presumed to continue after its existence is once shown is a presumption which ought not to be allowed to overthrow another presumption, of equal if not greater force, in favor of innocence. * * * There was not any evidence that the first husband of Mrs. K. was still living, but if this had been established we think she was still entitled to the benefit of the favorable presumption that the first marriage had been dissolved by a divorce."

In case III. it was said: "We have no right to conclude that because he has sanctioned previous violations of the law he will continue to do so; on the contrary, as every party is to be presumed innocent until his guilt is made manifest, we should presume that he repented his former transgression and therefore did not assent to the subsequent violation."

Where the acts grow out of the illicit relations of the sexes, this rule does not appear to hold good, as the following illustrations will show: —

I. A. and B. are indicted for living together in adultery; the jury are instructed that where criminal intercourse is once proved it will be presumed, if the parties live under the same roof, to still continue. *Held*, correct.¹

II. B. and C. live together, the latter as B.'s mistress; B. dies; that a marriage took place between them before his death will not be presumed.²

It has been said that while much will be presumed in favor of a marriage, after the removal of a barrier between parties who have been prevented from contracting it by a legal

¹ Carotti v. State, 43 Miss. 334 (1868).

² Floyd v. Calvert, 58 Miss. 46 (1876).

obstacle, no such presumption will arise where the parties were originally at liberty to form a legal or illegal union as they preferred. In such a case, having originally elected the criminal in preference to the lawful relationship, they must be presumed to have continued therein until some change of intention and wishes is affirmatively shown.¹ This distinction renders such cases as those in the above illustration completely in harmony with cases like *Wilkinson v. Payne* and others, noted under previous rules. In *Wilkinson v. Payne*,² an infant contracted a void marriage and lived with his wife until her death, which occurred only three weeks after he attained a legal age to marry, and it appeared that during the whole of that time she was on her death-bed. It was nevertheless held that a marriage would be presumed. The bar being removed, the presumption was in favor of innocence.

C.

I. A presumption of marriage arises from cohabitation; M. and Y. were proved to have lived together and cohabited; Y. afterwards married S. The presumption that Y. did not commit bigamy prevails over the presumption that M. and Y. were married.³

II. In 1840, marriages between whites and negro slaves are prohibited under penalty of fine and imprisonment; it is proved that a negro slave and a white woman lived and cohabited together; the presumption is that the relation was that of concubinage and not of marriage.⁴

D.

I. W. was indicted for the seduction of E. under a statute punishing the seduction of "any unmarried female of previous chaste character." The previous chaste character of E. will not be presumed.

¹ *Floyd v. Calvert*, 53 Miss. 46 (1876).

² 4 T. R. 468.

³ *Clayton v. Wardell*, 4 N. Y. 230 (1850); *Case v. Case*, 17 Cal. 598 (1861).

⁴ *Armstrong v. Hodges*, 2 B. Mon. (Ky.) 70 (1841).

⁵ *West v. State*, 1 Wis. 209 (1853). But see *State v. Wells*, 48 Iowa, 671 (1878). In *Slocum v. People*, 90 Ill. 281 (1878), the prosecution was under a statute punishing the enticing away from home for the purpose of prostitution, of any unmarried woman of chaste life and conversation. In deciding the case the Supreme Court said: "The presumption of law is that her previous life and conversation were chaste, and the onus was upon the defendant to show otherwise." But the case

“It is true,” it was said in case I., “that ordinarily the reasonable and just presumption is in favor of female chastity. So is likewise the presumption in favor of moral honesty. Happily, these presumptions are not only justified in all civilized nations, but nobly illustrated as well by the institutions of social life as by the laws enacted by government. Social intercourse is based upon the presumption of virtue, and society is obliged so far to conform to this law of its existence that even in its most corrupt state it is compelled to put on, at least, the form and semblance of virtue though its spirit may have departed. In every case in which the integrity of an individual is attacked the presumption of the law comes to his aid. Every person charged with crime is presumed innocent till he be proved guilty. Fraud is never to be presumed, but must always be proved. Every female charged with an offense, the essence of which is unchastity, is presumed to be chaste until the contrary appears. But these excellent and humane presumptions, so pregnant with the testimony which they bear to the dignity and honor of human nature, are always to be used, in the administration of justice, as a weapon of defense, not of assault. They are the shield of the accused, not the sword of the prosecutor. * * * The previous chaste character of the female is one of the most essential elements of the offense, made so by the express words of the statute in conformity with the suggestions of sound reason. A prostitute may be the subject of rape but not of seduction. It is the chastity of the female which the statute is designed to protect. The pre-existence of that chastity is the *sine qua non* to the commission of the crime. That is the subject of legal guardianship provided by this section. It is a substantive matter necessary to be averred and proved. If the

shows that she was only eighteen years old, that previous to her seduction she had resided with her parents, went to school and church and mingled in good society, and she testified on the trial that she never had intercourse with any man but the defendant. The expression of the court was therefore unnecessary, as there was proof enough to support the prosecution.

prosecutrix were to change places, and were she indicted for lascivious conduct, then, indeed, the legal presumption would come to her aid and her chastity would be presumed. But when the State accuses one of its citizens with the violation of the chastity of another of its citizens by seduction, the law presumes the accused to be innocent of the entire offense until the contrary appears. The State can not be permitted to presume the immediate pre-existence of that chastity with the destruction of which the defendant is charged. One act of illicit intercourse affords no presumption that another has not preceded it. * * * The error consists in the instruction which the court gave the jury to the effect that the law presumed that she was previously of a chaste character, independent of any proof whatever. This is setting up a presumption on the part of the State, the prosecuting party, incompatible with the presumption which the law affords the defendant, and if the principle should prevail the presumption of the virtue of one citizen might work the condemnation of another in whose favor the law affords equal, and when charged with crime, even stronger presumption."

E.

I. All persons are presumed to know the common and statute law, and are responsible for its violation.¹ Ignorance of the law excuses no one and can not be pleaded as an excuse for the commission of a crime.

II. A statute prohibits the selling of liquor to an intoxicated person and prescribes a penalty therefor. B. sells liquor to an intoxicated person not being aware of the law. B. is nevertheless liable, as he is presumed to know it.²

III. A public officer is indicted for extortion in taking a fee before it was due. The fee being due to him after a time in any event, he thought that the law allowed him to take it in advance. This is no excuse and he is convicted.³

¹ *Mayor of Baltimore, v. Norman*, 4 Md. 352 (1853).

² *Whitton v. State*, 37 Miss. 379 (1859).

³ *Com. v. Bagley*, 7 Peck. 279 (1828). But see *Cutler v. State*, 36 N. J. (L.) 135 (1873), where in a similar case, the conviction was set aside on the ground that the intent was wanting.

IV. A. is indicted for suffering gaming in his house. It appears that A. does not know it is unlawful to permit gaming in his house. His ignorance of the law does not excuse A.¹

V. At an election, a number of votes are polled for one B., who is acting at the time as returning officer. By the law a returning officer is not eligible as a candidate, and all the voters know that B. is acting in this capacity. There is no presumption that they know that he is disqualified.²

VI. A. having found some property secretes it with intent to defraud the owner contrary to a statute. A. is indicted under the statute for larceny. A. is a negro. The fact that it is the common belief among the negroes in the neighborhood that property belongs to the finder is irrelevant.³

In case II. it was said. "As he is bound to know the law, he is held to the consequences of a willful violation of it, whether he knew of its existence or not. Otherwise it would be difficult to punish any man for a violation of law, because it might be impossible to prove that he had knowledge of the law. Hence the legal presumption that every man knows the law, and that his violations of it are willful."

In case III. it was said: "This is the case of an honest and meritorious public officer who, by misapprehension of his rights, has demanded a lawful fee for a service not yet performed, but which almost necessarily must be performed at some future time. If we had authority to interfere and relieve from the penalty, we certainly should be inclined to do so, but we are only to administer the law."

In *Brent v. State*,⁴ it was ruled that the presumption of knowledge of law did not extend to presuming that a person knew how the courts would construe a statute, and whether it was constitutional or unconstitutional. The defendants here were indicted for conducting a lottery, and showed an act of the Legislature permitting them to do so. The court held the act unconstitutional, but said: "We see no

¹ *Winehart v. State*, 6 Ind. 30 (1854).

² *Queen v. Mayor of Tewkesbury*, L. R. 3 Q. B. 629 (1868).

³ *State v. Welch*, 75 Mo. 284 (1890).

⁴ 43 Ala. 297 (1869.)

good reason why the State as well as an individual is not to be held bound by this salutary and just maxim that no 'man shall take advantage of his own wrong.'¹ We think it clear that the appellant did not intend to violate any penal or other law of the State. In other words, that he acted in good faith, and verily believed he was doing what the State, by this statute, clearly authorized him to do. But it is insisted, on the part of the State, that everybody is presumed to know the law. This properly understood is true, but it is a rule of presumption, adopted from necessity, and to avoid an evil that would otherwise constantly perplex the courts in the administration of the criminal law; that is, the plea of ignorance. Hence the maxim, that 'ignorance of the law excuses no one.' The courts and the profession, however, well know that this necessary rule of presumption, is often, and perhaps oftener than otherwise, presuming against the truth. But we think the State presses this necessary rule beyond its proper measure, and insists that the appellant was not only bound to know the existence of the law, but in this case was presumed to know this special act of the Legislature was, and would be held to be, unconstitutional, and was, therefore, void and no law. We can not consent to carry this rule of presumption to this extent; it must be confined to presuming that all persons know the law exists, but not that they are presumed to know how the courts will construe it, and whether, if it be a statute, it will, or will not, be held to be constitutional. To extend this rule beyond this limit, will be to implicate the Legislature who passed, and the Governor who approved the act, in a charge of gross immorality and dishonesty. If the appellant is to be presumed to know the act was unconstitutional, the same presumption will fix upon them the same extent of knowledge; that is, that they knew the act, when it was passed and approved, was in

¹ Broom's Legal Maxims, top page 305

conflict with the constitution ; and if this be so, it will be a hard matter to clear either from this grave implication. But we are satisfied the rule must have the limit we give it. To hold otherwise, will take from the rule all its virtue, and make it odious to all right and just thinking men."

In case VI. it was said: "The defendant offered evidence to prove that it was a general belief among colored people in that county that money or property found having no marks upon it to indicate its ownership, belonged to the finder. The court properly excluded the evidence. It is a principle as old as the common law that ignorance of the law is no excuse for its violation ; and the law is the same for a colored as for a white person. We have not now a criminal code for the whites and a different one for the blacks. Under our present constitution no law making such a distinction would be of any validity. Wharton's Crim. Law,¹ is cited as sustaining the proposition that taking possession of money and determining to keep it under an honest belief of a right to do so because found, is a good defense. There is no section 88 at page 1794, and the sections on that page do not relate to the subject under consideration, but section 87, page 87, asserts the general proposition that 'ignorance or a mistake of fact is admissible for the purpose of negating a particular intention,' and that 'when a particular intent is necessary to constitute the offense (*e.g.*, in larceny, *animus furandi*, in murder, malice), then ignorance or mistake is evidence to cancel the presumption of intent and to work an acquittal either total or partial.' But in section 88, he says: 'When a statute makes an act indictable irrespective of guilty knowledge, then ignorance of fact is no defense.' On this proposition some learned authors differ in opinion from Mr. Wharton.² However this may be, the section of our

¹ Sect. 88, p. 1794.

² Bishop, 4 South. Law Rev. (n. s.) 58.

criminal code in question makes it a felony in a finder of goods or money belonging to another to convert them to his own use with intent to defraud the owner, or to make way with, or secrete them with that intent; and proof of ignorance of the law, or that the finder believed that he acquired the title by finding the property, does not tend to disprove the intent to convert it to its own use. If he did the act with the double intent named in the section, it is no defense that in his ignorance of the general law he supposed that by finding he became the owner of the property. It would be no defense that he was ignorant of the section under which he was indicted, which of itself apprises him that lost property does not belong to the finder, and why his ignorance of the general law to the same effect should avail him as a defense, is beyond our comprehension. By imposing a severe punishment upon the finder who converts to his own use the property of another, direct information is imparted that such does not become his by such finding. This is the import of the language of the section, and it is in harmony with a legal principle well established long before that section was enacted. It will not be contended that ignorance of the statutory provision will excuse its violation, and if ever ignorance of the law could constitute a defense it certainly will not do so when the identical section under which the accused is prosecuted informs him of the very principle of law of which he avers his ignorance."

F.

I. A. is charged with a crime. The presumption is that A. was sane when he committed it, and if he wishes to be excused on the ground of non-responsibility, he must prove insanity.¹

In case I., if A. was insane when he committed the act, he could not be punished, for an insane person can not commit a crime. If the presumption of innocence were

¹ *Cunningham v. State*, 56 Miss. 269 (1879).

general and without exception, the presumption would be that A. was insane — in other words that the act was not a crime; that he was innocent because he was non-responsible. But the presumption of sanity and the presumption of innocence coming in conflict, the latter must give way according to the best considered doctrine on this question. The subject is an important one, and has led to much discussion. The decisions are not harmonious, and no question is more debated at the present time, when it arises for actual decision, than the question of the burden of proof of insanity in criminal cases. Three different views have been advanced. The first is, that inasmuch as every man is presumed to be sane, the burden of proof rests on the party setting sanity up as a defense to establish this insanity beyond a reasonable doubt. This, it will be observed, entirely extinguishes the presumption of innocence in the conflict between that and the other presumption — the presumption of sanity. The second view likewise considers the presumption of innocence overthrown by the presumption of sanity, but holds that the presumption of sanity will prevail only until it is shown to be otherwise in the particular case by a preponderance of the evidence. In the third view, the presumption of innocence prevails to a certain extent, for, in the jurisdictions where this view is favored, it is held that insanity being pleaded, the burden of proof rests on the State to prove the sanity of the prisoner. It is not, however, held in the States which have adopted this view that insanity is presumed, but the rule is that if the prisoner gives any evidence to cast a doubt on his sanity, the State is obliged to prove his sanity beyond a reasonable doubt.

The first view seems at present to prevail only in the courts of Delaware¹ and New Jersey,² though at one time it

¹ *State v. Danby*, 1 Houst. (Del.) Cr. Cas. 175; *State v. Pratt*, *Id.* 269; *State v. Boice*, *Id.* 355; *State v. Draper*, *Id.* 531; *State v. Thomas*, *Id.* 511.

² *State v. Spencer*, 1 Zab. (N. J.) 201.

ruled in Alabama¹ and Missouri.² The second view prevails in the courts of Alabama,³ Arkansas,⁴ California,⁵ Iowa,⁶ Kentucky,⁷ Maine,⁸ Massachusetts,⁹ Missouri,¹⁰ North Carolina,¹¹ Ohio,¹² Pennsylvania,¹³ Texas,¹⁴ Virginia.¹⁵ And the third view is maintained in the courts of Illinois,¹⁶ Indiana,¹⁷ Kansas,¹⁸ Michigan,¹⁹ Mississippi,²⁰ Nebraska,²¹ New Hampshire,²² New York²³ and Tennessee.²⁴ But all of these theories agree in this—that the presumption of sanity overcomes the presumption of innocence at the outset and until *some* proof of insanity has been shown. And it has been held from the fact that a person was insane a short time before the commission of a criminal act there is no presumption that he was insane at the time of the act.²⁵

¹ *Brinyea v. State*, 5 Ala. 241.

² *State v. Huling*, 21 Mo. 464.

³ *McAllister v. State*, 17 Ala. 434; *State v. Marler*, 2 Ala. 43; *State v. Boswell*, 68 Ala. 307.

⁴ *McKenzie v. State*, 26 Ark. 334.

⁵ *People v. Coffman*, 24 Cal. 233; *People v. Wilson*, 49 Cal. 14; *People v. Messersmith*, 57 Cal. 573; *People v. McDowell*, 47 Cal. 124; *People v. Wreden*, 12 Ky. 682.

⁶ *State v. Felter*, 33 Iowa 49.

⁷ *Graham v. Com.*, 16 B. Mon. (Ky.) 587; *Smith v. Com.*, 1 Dav. (Ky.) 224; *Kriel v. Com.*, 5 Bush. (Ky.) 362.

⁸ *State v. Lawrence*, 57 Me. 574.

⁹ *Com. v. Rogers*, 7 Mete. (Mass.) 500; *Com. v. Eddy*, 7 Gray (Mass.), 583; *Com. v. Heath*, 11 Id. 303.

¹⁰ *State v. Klinger*, 43 Mo. 137; *State v. Smith*, 53 Mo. 267; *State v. Redemeler*, 71 Mo. 173; *State v. Erb*, 74 Mo. 199; *State v. Baber*, 74 Mo. 292.

¹¹ *State v. Payne*, 86 N. C. 309.

¹² *Loeffner v. State*, 10 Ohio St. 508; *Bond v. State*, 23 Ohio St. 249; *Bergin v. State*, 23 Ohio St. 115.

¹³ *Ortwein v. Com.*, 76 Pa. St. 423; *Lynch v. Com.*, 77 Id. 205; *Myers v. Com.*, 83 Id. 141; *Pannell v. Com.*, 86 Id. 268; *Hayres v. Com.*, 88 Id. 301.

¹⁴ *Webb v. State*, 9 Tex. App. 490; *King v. State*, Id. 553; *Johnson v. State*, 10 Id. 577; *Clark v. State*, 8 Id. 350; *Carter v. State*, 12 Id. 500;

¹⁵ *Boswell's Case*, 20 Gratt. (Va.) 880; *Baccigalupo's Case*, 23 Id. 807; *Dejarnette v. Com.*, 75 Va. 867.

¹⁶ *Fisher's Case*, 26 Ill. 283; overruled in *Hopps v. People*, 31 Ill. 385; *Chase v. People*, 40 Ill. 353.

¹⁷ *Polk v. State*, 19 Ind. 170; *Stevens v. People*, 31 Ind. 485; *Guetig v. State*, 66 Ind. 94.

¹⁸ *State v. Crawford*, 11 Kan. 82.

¹⁹ *People v. Garbutt*, 17 Mich. 2; *People v. Finley*, 33 Id. 432.

²⁰ *Cunningham v. State*, 56 Miss. 272.

²¹ *Wright v. People*, 4 Neb. 408.

²² *State v. Bartlett*, 43 N. H. 234; *State v. Jones*, 50 N. H. 309.

²³ *O'Connell v. People*, 87 N. Y. 880.

²⁴ *Dove v. State*, 3 Heisk. (Tenn.) 848.

²⁵ *People v. Smith*, 57 Cal. 130 (1880).

RULE 93.—The presumption of innocence may be strengthened — as by the relation of the parties

Illustration.

I. A. is indicted for the murder of B. The fact that B. is A.'s wife strengthens the presumption of his innocence.¹

In this case it was said: "It was the prominent fact in the case that the deceased was the wife of the prisoner. The presumption thence arising that she was not killed by her husband, or it was not of malice aforethought, was powerful. The relation of husband and wife clearly implies a strong partiality on the part of the husband towards his wife, and the most ardent desire to protect her and to render her happy. As a man will consult his own preservation and pursue his own interest, so, as a general rule, he will equally regard the protection and interest of his wife. The motive, for the most part, is both powerful and unintermitting, and that man must be truly unfortunate whose experience and feelings do not attest this unquestionable truth. Ought not, then, the strong presumption arising from the prisoner's relation to the deceased, and the probable motives from this source influencing his conduct, to be refuted if capable of a refutation? Of this I think there can be no question. Declarations of the husband that he killed his wife, threats to kill her, and evidence that he maintained criminal relations with other women, or had a former wife living, would all be relevant to overcome this presumption."

RULE 94. But except for the purpose of the trial, a presumption of guilt arises from the finding of an indictment.

Illustration.

I. R. is committed for attempt to murder, and indicted therefor by a grand jury. In a proceeding to reduce or increase his bail pending his trial, R. will be presumed guilty.²

¹ *State v. Watkins*, 9 Conn. 47 (1831); *State v. Green*, 35 *Id.* 203 (1868).

² *Ex parte Ryan*, 44 Cal. 555 (1872).

RULE 95. Where a person does an act which is unlawful unless he possesses a certain qualification, the burden is on the prosecution to show that he does not possess the requisite qualification (B), unless the proof is peculiarly in his possession (B), and that it may involve him in proving his innocence does not change the rule (C).

Illustrations.

A.

I. The indictment charged H. and E. with living together as husband and wife without having been married. The burden was on the State to show that they were not married.¹

II. A statute prohibited the sale of liquor to a slave without the consent of his owner. In a prosecution thereon, the burden is on the State to show that the owner did not consent to the sale.²

III. M. is indicted for selling liquor without a license. The burden was on M. to show the possession of a license.³

IV. W. is indicted for carrying away a slave without the consent in writing of the owner. The burden of showing that such consent in writing was not given is on the State.⁴

V. R. is indicted for coursing deer in an enclosed ground without the consent of the owner. The burden is on the prosecution to show that the owner had not given his consent.⁵

VI. A statute required a master, on the arrival of his vessel, to report it at the office of the chief officer of the customs. In a prosecution thereon, the burden of proving that the report was not made at the proper office is on the prosecution.⁶

VII. The use of steam engines and furnaces in a city being regulated by ordinance, the burden is on a person who complains of certain works of the kind as a nuisance, to show a non-compliance with the terms of the ordinance, or an unlawful or improper use of the works.⁷

¹ Hopper v. State, 19 Ark. 143 (1857).

² State v. Evans, 5 Jones (N. O.) L. 250 (1850); State v. Miller, 7 Ired. (N. O.) L. 275 (1847).

³ State v. Morrison, 3 Dev. (N. O.) L. 299 (1831).

⁴ State v. Woody, 3 Jones (N. O.) L. 376 (1855).

⁵ Rex v. Rogers, 2 Camp. 654 (1811).

⁶ United States v. Galacar, 1 Sprague (U. S.), 545 (1892).

⁷ Call v. Allen, 1 Allen (Mass.), 127 (1861).

The general rule, both in civil and criminal causes, is that the burden of proof is on the party holding the affirmative, but there are some exceptions in which the proposition, though negative in its terms, must be proved by the party who states it. As, for instance, in a prosecution for a penalty given by statute, if the statute in describing the offense, contains negative matter, the count must contain such negative allegation, and it must be supported by *prima facie* proof. Such is the case in the prosecutions for penalties given by statutes for coursing deer in enclosed ground, on land not the party's own, or taking other property not having the consent of the owner, or for selling as a peddler, goods not the produce or manufacture of the country, or for neglecting to prove a will without just excuse made and accepted by the judge of probate therefor. In these and the like cases, it is obvious that plenary proof on the part of the affirmant can hardly be expected, and therefore it is considered sufficient if he offer such evidence as, in the absence of counter testimony, would afford ground for presuming that the allegation is true. This, we have said, is the general rule, and those, among others, are the exceptions to this rule, but there is a solitary exception to the exceptions which we have stated, and that is the case where the negative averment is particular within the knowledge of the other party, in which case the averment is taken as true unless disproved by that party. Such, for instance in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any person except those who are duly licensed therefor — as for selling liquors, exercising a trade or profession, or the like. “Here, the party, if licensed,” it was said in case I., “can immediately show it without the least inconvenience, whereas if proof of the negative were required, the inconvenience would be very great. * * * But in this case it might be as inconvenient to the defendant to prove his marriage with the woman as it would be to the State to

prove circumstances to show that they were not really married." In *Commonwealth v. Thurlow*,¹ the defendant was indicted for selling liquor without a license. The court held that as the only authority from whom a license could be obtained was the board of county commissioners, who kept a record of all licenses issued, it was incumbent on the prosecution to produce *prima facie* evidence that the defendant was not licensed. "The general rule is," says Shaw, C. J., "that all the averments necessary to constitute a substantive offense must be proved. If there is any exception it is from necessity, or that great difficulty amounting practically to such necessity, or, in other words, where one party could not show the negative, and where the other could, with perfect ease, show the affirmative. But if a party is licensed as retailer under the statutes of this commonwealth, it must have been done by the county commissioners for the county where the cause is tried, and within one year next previous to the alleged offense. The county commissioners have a clerk, and are required by law to keep a record or memorandum in writing of their acts, including the granting of licenses. The proof is equally accessible to both parties; the negative averment can be proved with great facility, and, therefore, in conformity to the general rule, the prosecutor ought to produce it before he is entitled to ask a jury to convict the party accused."²

In case II. it was said: "It is manifest that the owner, employer, or manager of a slave can as easily be called on the part of the State to prove that he gave permission in writing to the slave to purchase or receive as a gift spirituous liquors, as for the defendant to call him or any other person to prove the contrary."

In case IV., case III. was distinguished. Two general

¹ 24 Pick. (Mass.) 374 (1837).

² See, also, *Commonwealth v. Kimball*, 7 Metc. (Mass.) 304 (1843); *Timson v. Moulton*, 3 Cush. (Mass.) 289 (1849); *Wilson v. Malvin*, 13 Gray (Mass.), 73 (1859).

rules it was said came in conflict in such cases, the rule that all the facts necessary to constitute the offense must be proved by the prosecution and the presumption of innocence. "It will not be disputed that the one which supports the presumption of innocence ought to be predominant and ought to yield to the other, unless it impose no hardships upon the defendant and be necessary to prevent a serious practical difficulty in the execution of the law. * * * The principle upon which all these cases (case II. and those in accord therewith) have been sustained is a plain, practicable, and intelligible one. It imposes no hardship upon a defendant to require him to produce a written document which his interest, as well as his duty, requires him to keep as a justification for acts which he may do every day and many times every day. It may well be taken as conclusive proof against him that he has no such document when he fails to produce it. It is true that he may by accident have lost it, but such instances are so rare that they ought not to affect the rule, especially when it is considered that he can, by proper application, procure another license or prove its loss and give satisfactory evidence of its contents. * * * So understood, the great conservative principle so essential to the security of those charged with crime, that they shall be presumed to be innocent, until the contrary is shown, will be preserved in all its integrity. Where no necessity can be shown for departing from such general rule, it must embrace an averment, though negative in its character. This is not only consonant with principle, but will be found supported by the highest authorities."

And it has been held that where a public officer does an act which would be a violation of his duty unless certain terms or conditions had been performed by an individual, such performance will be presumed to have taken place.¹

¹ Titus v. Kimbro, 8 Tex. 210 (1853).

B.

I. A statute prescribes a penalty for practicing medicine without a license. In a prosecution thereon the burden is on the defendant to show a license.¹

II. A statute prohibits a person from having game in his possession unless he possesses certain qualifications. The burden is on a person prosecuted under this act to show these qualifications.²

III. A statute prohibited importations of goods from England except in neutral vessels; in a prosecution thereon the burden is on the defendant to show the neutrality of the vessel.³

IV. An indictment is for retailing liquors without a license; the burden of proving a license is on the defendant.⁴

V. A statute prohibits the permitting of more than five slaves to assemble without the consent of the owners; it being proved that more than five slaves assembled on the defendant's lot, the burden is on him to prove the consent of the owners.⁵

VI. B. is charged with selling diseased meat without making the same known to the buyer; it is proved that B. sold diseased meat. The burden is on B. to show that he disclosed its condition to the buyer.⁶

VII. A statute punishes the injuring of any building "not having the consent of the owner thereof." In a prosecution thereon the burden is on the defendant to show such consent.⁷

VIII. W. is indicted for keeping a ferry without a license; the burden is on W. to prove a license.⁸

IX. Several persons are found together under circumstances which would render them guilty of riot, unless they are patrols acting under authority of law; the burden of proving that they are patrols is on them.⁹

¹ *Apothecaries' Co. v. Bentley*, Ry. & M. 159; *Sheldon v. Clark*, 1 Johns. (N. Y.) 513 (1806).

² *King v. Turner*, 5 M. & S. 206; *Rex v. Stone*, 1 East, 639; *Spires v. Parker*, 1 T. R. 144; *Jeifs v. Ballard*, 1 B. & P. 488; *Smyth v. Jeffries*, 5 Price, 258 (1821).

³ *United States v. Hayward*, 2 Call. (U. S.) 485 (1815).

⁴ *Gening v. State*, 1 McCord (S. C.), 573 (1822); *State v. Morrison*, 3 Dev. (N. C.) 299 (1831); *Haskill v. Commonwealth*, 3 B. Mon. (Ky.) 342 (1843); *Shearer v. State*, 7 Blackf. (Ind.) 99 (1844); *State v. Crowell*, 25 Me. 171 (1845); *Harrison's Case*, Roscoe Cr. Ev. 66; *State v. Edwards*, 60 Mo. 490 (1875).

⁵ *Commonwealth v. Conner*, 5 Leigh (Va.), 718 (1834).

⁶ *Seibright v. State*, 2 W. Va. 591 (1867).

⁷ *State v. Whittier*, 21 Me. 341 (1842).

⁸ *Wheat v. State*, 6 Mo. 455 (1840).

⁹ *State v. Atkinson*, 6 Jones (N. C.), 65 (1868).

In case II., Lord Ellenborough said: "The question is upon whom the *onus probandi* lies, whether it lies upon the person who affirms a qualification to prove the affirmative or upon the informer who denies any qualification, to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute to which the proof may be applied; and according to the argument of to-day every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information. If the former should establish the negative of any of these different qualifications that would be insufficient, because it would be said *non liquet* but that the defendant may be qualified under the other. And does not, then, common sense, show that the burden of proof ought to be cast on the person who, by establishing any one of the qualifications, will be well defended?"

C.

I. A. points a gun at B. In a prosecution for assault, the presumption is that the gun was loaded.¹

II. A. is indicted for murder; he pleads that he is under the age of presumed capacity. The burden is on A. to prove this.²

"The prosecutor could not, in one case out of a hundred, prove positively the fact that the gun was loaded when, if it was not, it was easy for the accused to remove the presumption, and show that it was not and that he knew it was not, by proclaiming the fact and inviting an examination."

In case II., as the subject of direct proof, the *onus* was on the prisoner, as the reputed age of every one is peculiarly

¹ *Caldwell v. State*, 5 Tex. 19 (1849).

² *State v. Arnold*, 13 Ired. (N. C.) L. 184 (1851).

within his own knowledge, and also the persons by whom it can be directly proved.

RULE 96. — A person is presumed to intend the natural and legal consequences of his acts.

Illustrations.

I. A debtor knowing himself to be insolvent, executes a bill of sale and an assignment of his book accounts to one of his creditors; the presumption is this was done with the intention of giving a preference to such creditor.¹

II. A married man is proven to have entered a house of prostitution in the evening and to have remained all night. The presumption is that he committed adultery while there.²

III. A baker is charged with delivering adulterated bread for the use of a public asylum. It is proved that A. delivered the bread. The presumption is that he intended it to be eaten.³

IV. B. is charged with setting fire to a building with intent to injure the owner. It is proved that B. fired the building. The presumption arises that he intended to injure the owner.⁴

V. A. forges the name of B. to a bill of exchange and negotiates it. The presumption is that A. intended to defraud B., and his intention to pay it when it became due is irrelevant.⁵

VI. B. forges C.'s name to a check on the bank of D. C. has no account there. The presumption is that B. intended to defraud C.⁶

VII. A. was employed by B. to purchase stock to a certain amount. A. gave B. a forged receipt for stock for that amount. The presumption is that A. did this with the intention of defrauding B., and B.'s opinion that he did not intend to defraud is irrelevant.⁷

VIII. C. is indicted for issuing a forged bank-note with intent to defraud the bank. The note was issued by C. to a third person, and it

¹ *Ecker v. McAllister*, 45 Md. 290 (1876); and see *Gardner v. Lewis*, 7 Gall. (U.S.) 377 (1843).

² *Evans v. Evans*, 41 Cal. 103 (1871); *Astley v. Astley*, 1 Hagg. Eccl. 720 (1828).

³ *King v. Dixon*, 3 M. & S. 12 (1814).

⁴ *R. v. Fanning*, R. & R. 207 (1811).

⁵ *R. v. Hill*, 2 Moody, 80 (1838).

⁶ *R. v. Nash*, 2 Den. C. C. 498 (1852).

⁷ *R. v. Sheppard*, R. & R. 160 (1809).

appeared that its execution was such as to render its spuriousness easily detectable by the officers of the bank who must examine it before paying it; but this an ordinary person would not discover. C. is presumed to have intended to defraud the bank.¹

IX. A. sets fire to a building. The presumption is that he intended to destroy it.²

X. A statute provided that the failure to pay over public money by a public officer should be punishable. A public officer was indicted for failing to turn over as required a license fee received by him. The presumption is that the failure was willful.³

In case **III.** Lord Ellenborough said, that it was a universal principle that when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act, and here it was alleged that he delivered the loaves for the use and supply of the children, which could only mean for the children to eat, for otherwise they would not be for their use and supply.

“The recorder,” said Maule, J., in case **VI.**, “seems to have thought that in order to prove an intent to defraud, there should have been some person defrauded; or who might possibly have been defrauded. But I do not think that at all necessary. A man may have an intent to defraud and yet there may not be any person who could be defrauded by his act. Suppose a person with a good account at his banker’s, and a friend with his knowledge forges his name to a check, either to try his credit or to imitate his handwriting, there would be no intent to defraud, though there might be parties who might be defrauded; but where another person has no account at his banker’s, but a man supposes that he has, and on that supposition forges his name, there would be an intent to defraud in that case, although no person could be defrauded.”

¹ *R. v. Mazagora*, R. & R. 291 (1815).

² *People v. Orcutt*, 1 Park. C. C. 252 (1851).

³ *State v. Heaton*, 77 N. C. 504 (1877).

In case *X.* it was said: "As men do not generally violate the criminal code, the law presumes every man innocent, and this presumption of innocence is to be observed by the jury in every case. But some men do violate the law, and as they seldom do unlawful acts with innocent intentions, the law therefore presumes every act in itself unlawful, to have been criminally intended until the contrary appears. A familiar example is on the trial of a case of homicide. Malice is presumed from the fact of killing, and the burden of disproving the malice is thrown upon the accused. The same principle pervades the law in civil as well as criminal actions, Indeed, if this were not so the administration of the criminal law would be practically defeated, as there is in most cases no other way of sustaining the intent than by establishing the unlawfulness of the act."

RULE 97. — Where an act is criminal per se a criminal intent is presumed from the commission of the act.¹

Illustrations.

I. N. is proved to have been stabbed with a dirk knife by T., from which wound he instantly died. T. is presumed to have intended to kill N.²

II. S. shoots at C. who is on horseback. The ball takes effect on C. and kills him. S. testifies that he shot at C. intending only that his horse should throw him. The presumption is that S. intended to kill C.³

In *Commonwealth v. Webster*,⁴ Chief Justice Shaw said: "The ordinary feelings, passions, and propensities under which parties act are facts, known by observation and

¹ *People v. March*, 6 Cal. 543 (1856); *Murphy v. Com.* 23 Grat. 990 (1873); *McCone v. High*, 24 Iowa, 336 (1863); *Murphy v. State*, 37 Ala. 142 (1861); *Carroll v. State*, 23 Ala. 28 (1853).

² *Com. v. York*, 9 Metc. 93 (1845); *Murphy v. People*, 37 Ill. 447 (1865); *Riggs v. State*, 30 Miss. 636 (1856); *State v. Bertrand*, 3 Ore. 61 (1866); *State v. Holme*, 54 Mo. 183 (1873); *Conner v. State*, 4 Yerg. 137 (1838).

³ *State v. Smith*, 2 Strobbh. 77 (1847).

⁴ 5 Cush. 316 (1850).

experience; and they are so uniform in their operation that a conclusion may be safely drawn that if a person acts in a particular manner he does so under the influence of a particular motive. Indeed, this is the only mode in which a large class of crimes can be proved. I mean crimes which consist not merely in an act done, but in the motive and intent with which they are done. But this intent is a secret of the heart which can only be directly known to the searcher of all hearts; and if the accused makes no declaration on the subject, and chooses to keep his own secret, which he is likely to do if his purposes are criminal, such criminal intent may be inferred, and often is safely inferred from his conduct and external acts."

Said Chief Justice Shaw, in case I.: "A sane man, a voluntary agent, acting upon motives must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If, therefore, one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life. So, if the direct tendency of the willful act is to do another some great bodily harm, and death in fact follows as a natural and probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used with violence upon the person of another, as this has a direct tendency to destroy life, or do some great bodily harm to the person assailed, the intention to take life or do him some great bodily harm is a necessary conclusion from the act." And to the same effect is the language of the chief justice of Pennsylvania: "He who uses upon the body of another at some vital part, with a manifest intention to use it upon him, a deadly weapon, as an ax, a gun, a knife, or a pistol, must in the absence of qualifying facts, be presumed to know that his blow is likely to kill; and knowing this must be presumed

to intend the death which is the probable and ordinary consequence of such an act.”¹

In case II. it was said: “If one were to fire a loaded gun into a crowd, or throw a piece of heavy timber from the top of a house into a street filled with people, the law would infer malice from the wickedness of the act; so, also, the law will imply that the prisoner intended the natural and probable consequence of his own act, as in the case of shooting a gun into a crowd, the law will imply from the wantonness of the act, that he intended to kill some one, though it might have been done in sport. If the prisoner’s object had been nothing more than to make Carter’s horse throw him, and he had used such means only as were appropriate to that end, then there would have been some reason for applying to his case the distinction. * * * But in this case the act indicated an intention to kill—it was calculated to produce that effect and no other—death was the probable consequence and did result from it.

“If a man raises his rifle and deliberately fires its contents into the bosom of another, or by a blow with an ax, which might fell an ox, buries it into the brain of another, the inference from the act is irresistible that death was meant, and so the law presumes.

“The inferences of the mind, which are equally presumptions of law, are certain and conclusive in proportion as the acts, from their nature and character, are certain to result in death.

“Thus, the plunging of a poignard into the heart of another, we do not doubt, was intended to kill, but if aimed only at the arm or leg, though death may be the result, yet the mere fact of giving such a blow, so long as that is the only criterion by which we judge, renders the intent more doubtful and the inference less strong. So if one beat a full-grown man with his fist, and death ensues, we would ordinarily feel far more doubt that death was intended than if it

¹ Agnew, C. J., in *Com. v. Drum*, 58 Pa. St. 17 (1866).

had been produced by the use of a dangerous weapon. So, too, regard may be had to the relative strength and powers of endurance of the parties, as well as to the mode in which the violence is applied.

“A powerful blow given by the fist alone (but not repeated) upon the head of a full grown man would not ordinarily be regarded as intended to produce death; but what else could be inferred if the same blow were planted upon the temple of an infant child!

“In many cases the inference that death is intended is as strong when perpetrated by a drunken as when perpetrated by a sober man. Thus, if by a deadly weapon, as by a rifle or a bowie knife, a bullet or blow is sent directly or designedly to some vital spot, we should infer that death was intended with almost equal certainty, whether the perpetrator were drunk or sober. So, too, when death is produced by poison, and we see in the mode of its administration stealthy calculation, we would infer that death was intended, whether he who administers the poison was in a state of sobriety or intoxication, since in the very character of the act we could read design.

“But we also know that intoxication produces more effect upon the nervous system of some than of others. It clouds and obscures the judgment of one more than it does another. It produces greater extravagance of exertion and action in some than it does in others, and sometimes consequences result from such extravagant exertion and action of which the party himself had no idea. All these things are to be considered by this jury in determining upon this question of intent.”

Sub-Rule 1. — *But when a specific intent is required to make an act an offense, the doing of the act does not raise a presumption that it was done with the specific intent.*

Illustrations.

I. R. is charged with assaulting with intent to murder one E. It is

proved that R. fired a loaded pistol at E. There is no presumption that R. intended to murder E.¹

II. A statute makes a willful, deliberate and premeditated killing murder in the first degree. B. kills C. There is no presumption that the killing was deliberate and premeditated.²

In case I. it was said: "The general rule is well settled, to which there are few if any exceptions, that when a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself and must be found by the jury, as matter of fact, before a conviction can be had. But especially when the offense created by the statute, consisting of the act and the intent, constitutes, as in the present case, substantially an attempt to commit some higher offense than that which the defendant has succeeded in accomplishing by it, we are aware of no well founded exceptions to the rule above stated, and in all such cases the particular intent must be proved to the satisfaction of the jury; and no intent in law or mere legal presumption differing from the intent in fact, can be allowed to supply the place of the latter."

Where one slays another with a deadly weapon, the presumption is that he did it voluntarily³ and with malice.⁴ So from proof of a design to injure another, malice is presumed.⁵ Where a statute makes a willful, deliberate, and premeditated killing murder in the first degree, and it appears that a killing took place (intentional, not accidental), there is no presumption that it was deliberate and premeditated.⁶ But from the simple act of killing, the law presumes murder in the second degree.⁷ When a homicide

¹ *Roberts v. People*, 19 Mich. 401 (1870); *Mayhew v. People*, 10 *Id.* 212 (1862).

² *Com. v. Drum*, 58 Pa. St. 9 (1876); *State v. Mitchell*, 64 Mo. 191 (1876); *State v. Foster*, 61 *Id.* 549 (1876); *State v. Lane*, 64 *Id.* 319 (1876); *Hamby v. State*, 55 Tex. 523 (1872).

³ *Oliver v. State*, 17 Ala. 567 (1850).

⁴ *Murphy v. State*, 37 Ala. 143 (1861); *Carroll v. State*, 28 Ala. 28 (1853).

⁵ *McCord v. High*, 24 Iowa, 336 (1868).

⁶ *State v. Foster*, 61 Mo. 549 (1876); *Commonwealth v. Dunn*, 58 Pa. St. 9 (1876); *State v. Mitchell*, 64 Mo. 191 (1876); *State v. Lane*, 64 Mo. 319 (1876).

⁷ *State v. Gassert*, 65 Mo. 352 (1877); *State v. Evans*, 65 Mo. 574 (1877); *State v. Turner, Wright (O.)* 20 (1861).

has been proven, that fact alone authorizes the presumption of malice, and, unexplained, would warrant a verdict for murder in the second degree. But express and premeditated malice, can never be presumed; it is evidenced by former grudges, previous threats, lying in wait or some concerted scheme to kill or do some bodily harm, as poisoning, starving, torturing, or the attempted perpetration of rape, robbery, or burglary, and these evidences of express malice, or some of them, must be proven as directly as the homicide, before the jury are authorized in finding a verdict for murder in the first degree.¹

“Such being the general characteristics of presumptions of fact, I proceed to notice specially some of the more prominent among these presumptions, and the first that strikes the eye is the presumption, as it is called, of intent. The first criticism here to be made is that in setting up this presumption we pass from the sphere of inductive reasoning and enter upon that of deductive; and, in so doing, depart from the true field of practical jurisprudence. The syllogism presented to us is as follows: —

“Whoever does an act intended it:

A. did this act;

Therefore he intended it.”

“But the major premise, like all other universal and absolute statements involving human action, is untrue. Acts are so far from being always intended by those to whom they are imputable, that in a large number of cases they are unintended. Negligent offenses are perhaps more numerous, and at the same time more varied, than intended offenses. For one effect produced by us which corresponds to our intent, there may be a dozen which do not correspond. A telegraph operator may delay for half an hour forwarding a message. His intent, we may presume, is to get his dinner when it is ready. But this delay may produce a multitude of unintended injuries. It may discom-

¹ Hamby v. State, 36 Tex. 523 (1873).

pose a whole system of railroad connections, so that in some remote spot, of which perhaps the operator may have never thought, a collision may occur. It may prevent innumerable appointments from being fulfilled; it may cause innumerable injuries to persons or property on the wide system of roads it affects. The negligence, in fact, usually operates on a far wider surface than the willful act, simply because the willful act is usually insulated and intrusive, while the negligence is an omission in the performance of one of a long series of inter-dependent duties, of which, when one falls all fall. But between negligence and malice there is this fundamental distinction: the first is a lack of intent, arising from intellectual defect; the second is a bad intent, arising from moral defect. It is of the essence of malicious offenses that they are intended; it is of the essence of negligent offenses that they are not intended. Of a majority of the cases in which one man invades the rights of another, we may safely say the injury, in the form it was perpetrated, was unintended. As a majority of the cases covered, therefore, by the proposition before us, it is false.

“We must also remember, in further illustration of the conclusion just stated, that there are few cases in which the object intended, even among what are called malicious crimes, is actually affected. A number of scholastic distinctions have been taken in this relation, and have been considered by me elsewhere. It is sufficient, at present, stripping them of their technical forms, to notice some of the more prominent.

“1. An unintended object may fortuitously intervene between a blow aimed, and the person intended to be hurt. A., for instance, shoots at B. After the pistol is aimed, and at the moment of its discharge, A.’s child suddenly darts in the way. The killing of A.’s child, so far from being intended by A., is of all things the most abhorrent to him.

“2. B. is struck by A. when mistaken for C. Here A.

intends to strike B., but intends to strike him under a mistake of person. The intended object is hit, but the object is invested with wrong attributes, and is aimed at under the false belief that it possesses these attributes. A., for instance, as in *Levett's Case*, shoots at a casual visitor, B., imagining B. to be a burglar. Or A. shoots at his child, B., imagining the child to be an enemy whom he designed to kill. Here there is no intention to kill B., as B. really is, though there is an intention to kill some one whom B. is supposed to be.

“3. Or an act may be from a contingent intent. A. shoots at B., knowing that B. is in a place (*e.g.*, a railway carriage), in which other persons are sitting. A. knows that he runs the risk, when shooting at such an object, of killing another person than the one at whom he aims. He kills C., sitting next to B. Undoubtedly he may be regarded as embracing C. within the scope of his purpose. But nevertheless, he did not intend to kill C., and would have avoided the contingency of so doing if he could have done so without abandoning his purpose of killing A.

“4. The victim is not mistaken for another, nor killed fortuitously, nor killed incidentally to the attempted killing of another, but killed because he is falsely supposed to have property on him which can be readily appropriated by the assassin, or falsely supposed, as in the remarkable case of the murder of White by Crowninshield, to stand in the way of an inheritance.

“Now, in no one of the four cases above given does the intent square with the execution, yet of what are called malicious killings these categories constitute a large proportion. Taking them in connection with negligence, we may say, therefore, that in only a small portion of offenses does the offender execute that which he really intends. It is not generally true, therefore, but generally false, that an act is intended by its perpetrator.

“Does this, again, land us in skepticism? Because we have to reject the proposition that all offenses are intended,

are we to sweep out of existence the entire category of malicious crimes, and say that there is no way in which a malicious crime can be proved? So far from this being the case, the rejection of the false proposition here criticised leads us to the only logical and just way in which malice can be established. It undoubtedly imposes higher intellectual labor on bench and bar, and requires from them higher intellectual gifts, than did the old system by which malice was at the outset assumed. It undoubtedly is an easy thing to say, 'he did it, therefore he did it maliciously and intentionally.' But it is an untruth in many cases, and in all cases it is a *petitio principii*; sometimes leading to bad pleading, causing men to be indicted for the wrong crime instead of the crime really committed; sometimes oppressing innocent men, by throwing the burden of proof on them, when the burden is really on the other side; sometimes producing acquittals because the jury feel that the assumption is an outrage on common sense, as when they are told that shooting a tame fowl with intent to steal, when the ball glances and strikes B., whom the assailant did not see, and had no reason to imagine to be in the neighborhood, is shooting at B., 'with intent the said B., feloniously, willfully and of malice aforethought, to kill and murder.' The only logical and right way is to indict a man for what he really does. If he is trying to steal a tame fowl, then he is indictable for an attempt at larceny. If he kills a man negligently when trying to steal the fowl, then he is indictable for negligent homicide. And when he is indicted for an intentional and malicious act, then the conclusion is to be reached by a canvassing of all the circumstances of the case. No two cases are precisely alike. There is no rule which fits absolutely even two cases. We must put all the facts together, and examine whether from them, by free logic, we can infer malice. The process is not deductive, but inductive. It is determinable not *a priori* by any postulate of positive jurisprudence, but, after the evidence is in, by inference from all the circumstances of the case.

The question, therefore, is one of fact for the jury, to be adjusted by the law of sound reasoning, not by technical jurisprudence to be absolutely pronounced by the court. Yet, while for the jury, and, in the sense above stated, a question of fact, it is also a question of law in its most comprehensive sense, of the law of inductive proof. And to this law, as pouring its light upon all the circumstances of the case, should the attention of counsel be turned in their argument, and of the courts in their charge."¹

RULE 98. — Possession, knowledge, or motive may overthrow the presumption of innocence, and raise in its place a presumption of guilt.

"If A. brings an action of trover against B. for the conversion of a horse, and proves title in himself and a demand, it devolves the burden on B. of proving that the title of A. has been divested or that he has a better. And it will not be presumed that B. has purchased the horse of A. If the close of A. has been broken, and a fruit tree dug up and carried off, and that tree is found set out in the yard of B., especially if he is doing some act which shows that he has a knowledge of its being there, it affords *prima facie* evidence that he was the trespasser. So if a house had been removed from the land of A. and is found on the land of B. and occupied by B., under the plea of not guilty, in an action of trespass, it devolves upon B. the necessity of accounting for its being there consistently with his innocence."² A presumption is a probable inference which common sense draws from circumstances usually occurring in such cases.³ There is a wide difference between presumptions of law and presumptions of fact. The law draws no presumption or inference but from facts which if unexplained are conclusive of guilt. But presumptions of

¹ Presumptions in Criminal Cases, Francis Wharton, Crim. Law Mag. 1881.

² Finch v. Alston, 3 H. P. (Pa.) 85 (1832).

³ State v. Tibbert, 35 Me. 81.

fact are to be drawn by the jury, and every fact that tends to prove any fact that is evidence of guilt, however conclusive such fact may be, is admissible evidence.¹ Where property has been stolen, and recently thereafter the same is found in possession of a party, it is incumbent on him to account for such possession in a manner consistent with his innocence or rebut the presumption of guilt arising by reason of such recent possession, and until he so accounts for such possession or so rebuts such presumption, the law presumes he is the thief. The possession of the fruits of crime recently after its commission is *prima facie* evidence of guilty possession, and if unexplained either by direct evidence or by attending circumstances or by the character and habits of life of the possessor, it is taken as conclusive. And the strength and character of this presumption will depend very much on the kind and description of the property when considering the recent possession and all the various circumstances surrounding the case."² The rule has been stated in a North Carolina case to be, that it is only where the stolen goods are found in a party's possession so soon thereafter that he could not have reasonably got the possession unless he had stolen them himself, that the law presumes that he is the thief,³ and this is a well known limitation to the rule as stated above. "Possession of stolen property must be recent, after the theft, in order to raise the presumption of theft."⁴

It is held in Illinois that it is error to instruct the jury that the possession of stolen property soon after it is stolen is *of itself prima facie* evidence that it was stolen by the party in whose possession it is thus found, and throws the burden on him of showing that his possession was honest.⁵ Everything connected with the possession must be consid-

¹ *Balaam v. State*, 17 Ala. 451 (1850).

² *State v. Gray*, 37 Mo. 463 (1866); *State v. Bruin*, 24 Mo. 537 (1864).

³ *State v. Graves*, 73 N. C. 482 (1875).

⁴ *State v. Wolf*, 15 Mo. 169 (1851); *State v. Floyd*, 15 Mo. 354 (1852); *Fackler v. Chapman*, 20 Mo. 249 (1855); *State v. Creson*, 38 Mo. 373 (1866); *State v. Williams*, 54 Mo. 170 (1873); *State v. Robbins*, 65 Mo. 443 (1877).

⁵ *Conkwright v. People*, 35 Ill. 204 (1864).

ered, such as its proximity, whether it was concealed, whether the party admitted or denied the possession, whether other persons had access to the place where it was found.

Illustrations.

I. A. being accused of stealing money, afterwards points out where the money is hidden. The presumption is that A. was the thief.¹

II. A. was prosecuted for suffering intoxicating liquor to be drunk in his grocery. It was proved that certain liquor sold by A. was drunk in his store. *Held*, that it was to be presumed that it was drunk with A.'s permission.²

In case II. it was said: "The witness proved that the liquor sold by defendant was drunk at his house, and the legal presumption arises that this was done by his permission, as every man is supposed to have a control in his own house. If this was not the fact, the defendant could have shown that he forbade the drinking, and it was incumbent on him to show the matter of defense."

"The effect of particular motives upon human conduct," says an eminent writer,³ "is the subject of every man's observation and experience to a greater or less extent, and in proportion to his attention, means of observation, and acuteness every one becomes a judge of the human character and can conjecture on the one hand what would be the effect and influence of motives upon any individual under particular circumstances, and on the other hand is able to presume and infer the motives by which an agent was actuated, from the particular course of conduct which he adopted. Upon this ground it is that evidence is daily adduced in courts of justice of the particular motives by which a party was influenced in order that the jury may infer what his conduct was, under those circumstances, and on the other hand juries are as frequently called upon to infer what a man's motives and intentions have been from his conduct and his acts. All this is done because every man is presumed to possess a knowledge of the connection

¹ *Hudson v. State*, 9 Yerg. (Tenn.) 408 (1836).

² *Casey v. State*, 6 Mo. 646 (1840).

³ *Stark. Ev.* 50, 51.

between motives and conduct, intentions and acts, which he has acquired from experience, and be able to presume and infer the one from the other." As to presumptions of motive from conduct *Bond v. Warren*,¹ is an instructive case. W. was sued for an assault on B. The only witness at the trial was a daughter of B., who testified that on the occasion complained of, W. walked into her father's house and said: "How dare you send a letter to my house;" that B. replied, "What do you mean, sir?" and that W. immediately commenced the assault complained of. The witness knew that W. had a daughter; had never seen him at B.'s house before and did not know of any previous difficulty between W. and B. The jury were instructed that although on this evidence they might infer that B. had sent a letter to W.'s house, they could not presume that the letter had been sent to W.'s daughter or was offensive or insulting, but, if this were so, W. should show it. On appeal this was held to be error. "What motive," said the court, "can fairly and reasonably be inferred from such conduct but that a letter was sent by the plaintiff to the defendant's house, which was, or which the defendant supposed to be, offensive in its terms? It is impossible to suppose that a sane man would have acted towards one with whom he was on friendly terms as the defendant did towards the plaintiff unless he in some way felt himself aggrieved by the act of the other. If such an inference, then, was a fair and reasonable one, the jury had a right to draw it, and the judge erred in instructing them otherwise."

RULE 99. — A person on trial for one crime can not be presumed guilty because he has, at another time, committed a similar or different crime, and the latter fact is not admissible in evidence against him.²

"Suppose the general character of one charged with crime is infamous and degraded to the last degree — that his

¹ 8 Jones (N. C.) L. 191 (1860).

² *Ellis v. Day*, 4 Conn. 95 (1821).

life has been nothing but a succession of crimes of the most atrocious and revolting sort — does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he has added the particular crime for which he is being tried to the list of those that have gone before? Why, then, should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt? The answer to all these questions is plain and decisive; the law is otherwise; it is the law that the prisoner shall be presumed innocent until his guilt is proved.”¹ This rule is said by Mr. Stephen² to be one of the most characteristic and distinctive features of the English criminal law, preventing, as it does, a man charged with a particular offense from having either to submit to imputations which, in many cases would be fatal to him, or else to defend every action of his own life in order to explain his conduct on the particular occasion when the act was committed with which he is charged. It is this rule which, perhaps, more than any other rule of our criminal law, distinguishes the American and English modes of conducting a criminal trial from the continental. In France the criminal on trial for a particular crime is confronted with his whole past life, and every act he has committed against the law is shown for the information of the jury. The practice is similar in Germany. The English State Trials contain numerous instances of the admission of evidence of this kind. Thus, in 1668, on the trial of Mr. Hawkins, a clergyman, for stealing some money and a ring from one Larimore, Lord Hale admitted evidence to show that he had stolen a pair of boots from a man named Chilton, and that, more than a year before, he had picked the pockets of one Noble. In summing up, Lord Hale said, after referring to the cases of Chilton and Noble: “This, if true, would render the prisoner at the bar obnoxious to any jury.”³ But the

¹ *State v. Lapage*, 57 N. H. 300 (1876).

² *Steph. Ev.*, note VI., p 195.

³ 6 *How. St. Tr.* 935.

beginning of the eighteenth century witnessed the end of this system, and the American courts have never known it.

Illustrations.

I. The question is whether A. committed a crime. The fact that he formerly committed another crime of the same sort, and had a tendency to commit crime, is irrelevant.¹

II. L. was indicted for the murder of J., in perpetrating a rape upon her. Proof that L. committed a rape on R., some time previous to the alleged crime was admitted. *Held*, error.²

III. S. was indicted for murdering his wife by poisoning. Proof that he was criminally intimate with one A., whose husband died with the same symptoms as his own wife, was inadmissible.³

IV. R. was indicted for riot. The fact that, two years previous, R. had been engaged in another riot was inadmissible.⁴

V. C. was indicted for forging the indorsement of V. to a promissory note; the question was whether he honestly believed he had authority to sign V.'s name. The fact that he had acknowledged to having made a similar unauthorized use of the name of G. was inadmissible.⁵

VI. K. was indicted for stealing a bag of flour with P.; P. having turned State's evidence, testified that K. proposed the theft to him, and at the same time proposed to forge notes on dead men's estates and steal negro children. The admission in evidence of the latter proposals was erroneous.⁶

VII. B. was indicted for larceny of bank-bills in snatching them from the hand of R. The fact that B., the next day, enticed R. into an alley, knocked him down, beat him and robbed him of other bills, is irrelevant.⁷

VIII. C. was indicted for larceny in stealing a horse. The fact that C., the day previous, stole a sum of money is irrelevant.⁸

IX. R. was indicted for performing an abortion on B. The proof that R. three years previous, produced an abortion on W., is inadmissible.⁹

¹ *Rex v. Cole*, 1 Phil. Ev. 508, citing Steph. Dig. Ev. 18.

² *State v. Lapage*, 57 N. H. 245 (1876); *State v. Walters*, 45 Iowa, 389 (1877); *People v. Bowen*, 49 Cal. 654 (1875).

³ *Shaffner v. Commonwealth*, 73 Pa. St. 60 (1873).

⁴ *State v. Beaton*, 15 N. H. 174 (1844).

⁵ *People v. Corbin*, 56 N. Y. 383 (1874).

⁶ *Kinchelov v. State*, 5 Humph. (Tenn.) 9 (1844).

⁷ *Bonsall v. State*, 35 Ind. 460 (1871); *People v. Barnes*, 48 Cal. 551 (1874).

⁸ *Barton v. State*, 18 Ohio, 221 (1849).

⁹ *Rosenweig v. People*, 63 Barb. (N. Y.) 634 (1873).

X. S. was charged with the murder of an illegitimate child of his daughter, of which he was the father. Proof that S. had previously committed a rape on this daughter was inadmissible.¹

XI. S. was indicted for murdering her infant child. Proof that S. had a child before and put it away, is inadmissible.²

“It is a maxim of our law,” it was said in case II., “that every man is presumed to be innocent until he is proved to be guilty. It is characteristic of the humanity of all the English-speaking peoples that you can not blacken the character of a party who is on trial for an alleged crime. Prisoners ordinarily come before the court and jury under manifest disadvantages. The very fact that a person is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite inconsistent with that fairness of trial to which every man is entitled, that the jury should be prejudiced against him by any evidence except what relates to the issue; above all, should it not be permitted to blacken his character, to show that he is worthless, to lighten the sense of responsibility which rests upon the jury, by showing that he is not worthy of painstaking and care, and, in short, that the trial is what the chemists and anatomists call *experimentum in corpore vili*.”

In case III. it was said: “It is a general rule that a distinct crime, unconnected with that laid in the indictment, can not be given in evidence against a prisoner. It is not proper to raise a presumption of guilt on the ground that having committed one crime the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof in itself of the commission of another crime, yet it can not be said to be without influence on the mind, for, certainly, if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged. It therefore predisposes

¹ Snyder v. Commonwealth, 85 Pa. St. 519 (1877); and see Sutton v. Johnson, 63 Ill. 209 (1871).

² State v. Shuford, 69 N. C. 457 (1873).

the mind of the juror to believe the prisoner guilty. To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish, or it must be necessary to identify the person of the actor by a connection which shows that he who committed the one must have committed the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him of which, if fairly tried, he might acquit himself."

"The cases," it was said in case V., "in which offenses other than those charged in the indictment may be proved for the purpose of showing guilty knowledge or intent are very few, and this, we think, is not one of them. The fact that the prisoner made an unauthorized use of the name of G., if established, shows that he was morally capable of committing the same offense against V., but does not legitimately tend to show that he did so, or that he knew and understood that V.'s authority had been withdrawn or that the signature in question had been made with criminal intent."

It was said in case VI.: "The only object of such testimony, necessarily, is to prejudice the minds of a jury, as it can by no possibility establish or elucidate the crime charged. We can well see how a jury who, in the case under consideration, might have unhesitatingly refused to find a verdict against the prisoner upon the evidence of the witness confined within its legitimate scope, might have been misled by the proof of the utter baseness and want of principle as detailed against him."

In case VIII. it was said: "Although the court, in this instance, say that the evidence was only admitted for the purpose of showing the intent with which the defendant got

possession of the property, yet we do not see any connection between the two transactions that would establish any legitimate conclusion to be drawn as to that fact. The only conclusion that we can see that could fairly be drawn from the evidence would be that the defendant intended to steal the horses and other property with which he was charged, because he was a thief and had just before stolen a sum of money. Each case must be tried on its own merits, and be determined by the circumstances connected with it, without reference to the character of the party charged, or the fact that he may have previously committed similar crimes."

In case *X*. it was said: "In case the direct evidence of the homicide was not entirely satisfactory to the jury, yet they may readily have concluded, if he was such a monster as to have committed a rape on his own daughter, he had a heart sufficiently depraved to commit the murder charged against him. He was denied that protection, on his trial, which the law gives to every person charged with the commission of crime."

Other instances may be given. Thus, where a person was indicted for burglariously entering a building, evidence that there was found on him a key that would open another building, is inadmissible.¹ A person indicted for having stolen a watch from one person, can not be shown to have previously stolen a cloak from another person.² A person indicted for murder can not be shown to have previously set fire to the house of the deceased.³ A person indicted for poisoning A. can not be shown to have poisoned B. several months previously.⁴ A person charged with an assault to rob can not be shown to have committed other assaults.⁵ A person charged with arson can not be shown to have been previously imprisoned as a pickpocket.⁶

¹ *Commonwealth v. Wilson*, 2 Cush. (Mass.) 590 (1849).

² *Walker's case*, 1 Leigh (Va.), 574 (1829).

³ *Stone v. State*, 4 Hump. (Tenn.) 27 (1843); and see *Brook v. State*, 26 Ala. 104 (1855).

⁴ *Farrar v. State*, 2 Ohio St. 54 (1853).

⁵ *Coble v. State*, 31 Ohio St. 100 (1876).

⁶ *Cesure v. State*, 1 Tex. App. 19 (1876).

RULE 100. — But to prove knowledge or intent (A) or motive (B), a collateral crime may be shown.

Illustrations.

A.

I. A. is indicted for uttering a bank-note, knowing it to be forged. Evidence that A. had uttered other forged notes of the same or different kind, or that he had others in his possession, is admissible.

II. A. is charged with receiving two pieces of silk from B, knowing them to have been stolen by him from C.; the facts that A. received from B. many other articles stolen by him from C. in the course of several months, and that A. pledged all of them, are admissible, because relevant to the fact that A. knew that the two pieces of silk were stolen by B. from C.¹

III. A. is charged with attempting to obtain money by false pretenses by trying to pledge to B. a worthless ring as a diamond ring. The fact that, two days before, A. tried, on two separate occasions, to obtain money from C. and D., respectively, by a similar assertion as to the same or a similar ring, and that on another occasion on the same day he obtained a sum of money from E. by pledging, as a gold chain, a chain which was only gilt, are deemed to be relevant, as showing his knowledge of the quality of the ring.²

IV. W. was indicted for an assault with intent to commit a rape on M. Proof that W. had previously assaulted M. in the same way was admissible.³

V. A. is indicted for having in his possession intoxicating liquors, with intent to sell them unlawfully; evidence that he had been previously convicted for a similar offense is admissible.⁴

VI. A. and B. were indicted for burglary in the house of C. Evidence that a few days previous they agreed to commit a robbery on the person of C., but desisted because they believed he had nothing on him to rob, was admissible.⁵

Case IV. is a good illustration of the general rule and its exception. The prisoner was indicted for an assault with intent to commit a rape on one Mina Shepherd. On the

¹ Dunn's Case, 1 Moody, 146; and see *Yarborough v. State*, 41 Ala. 405 (1868); *Baker v. State*, 4 Ark. 56 (1842).

² *Reg. v. Francis*, L. R. 2 Q. C. R. 128; *Reg. v. Cooper*, 1 Q. B. D. 12.

³ *State v. Walters*, 45 Iowa, 889 (1877); *Williams v. State*, 8 Hump. (Tenn.) 590 (1848).

⁴ *State v. Neagle*, 65 Me. 468 (1876).

⁵ *State v. Cowell*, 12 Nev. 337.

trial, evidence was admitted that the prisoner had previously assaulted, in the same way, both Mina and her sister Dora. The prisoner was convicted, and on appeal the court held that the evidence as to Mina was properly, but the evidence as to Dora, improperly, admitted. The evidence of the assault on Mina was proper, as showing the intent with which the subsequent assault was made, while the evidence as to Dora, was evidence of a "distinct substantive, which can not be admitted in support of another offense." So as to knowledge. To this class belong, generally, those cases in which the crime is the uttering of forged or counterfeit money, or the receiving of stolen goods. It may well happen that a person may have in his possession a single counterfeit bill or coin, without knowing it to be such, but he would be much less likely to do so twice, and every repetition of such an act would increase the probability that he knew that the bills or coin were counterfeit. But when it appears that a person is in the habit of buying goods (like old iron) legitimately and honestly, the wrongful act in receiving one article is not competent to prove a criminal intent in receiving another, differing in time, kind of property, the person from whom stolen, and the person from whom received.¹

B.

I. T. was indicted for the murder of W., a female. Evidence that T. had previously maintained criminal relations with W., is admissible.²

II. D. was indicted for the murder of W. Proof that D. had previously been implicated in the murder of E. and that W. was, at the time of his death, engaged in endeavoring to discover the murderers of E., is admissible.³

III. C. is indicted for murder; to show a motive for the crime, it is proper to show the existence of a secret criminal organization to which C. belonged.⁴

¹ *Coleman v. People*, 55 N. Y. 81 (1878).

² *Turner v. Commonwealth*, 56 Pa. St. 54 (1878).

³ *Dunn v. State*, 3 Ark. 227 (1839).

⁴ *Carroll v. Commonwealth*, 84 Pa. St. 107 (1877).

IV. C. is indicted for the murder of H. The fact that C. had previously employed H. to murder one P. is relevant.¹

V. W. was indicted for the murder of his wife. Proof of an adulterous intercourse between W. and another woman is admissible.²

In case IV., the prisoner's counsel argued that as P.'s death was not the subject of the inquiry, the evidence was inadmissible. But Littledale, J., said: "I think I must receive the evidence on the part of the prosecution; it is put thus: That the prisoner and others employed H. to murder P., and that he being detected, the prisoner and others then murdered H. to prevent a discovery of their own guilt. Now, to ascertain whether that was so in point of fact, it is necessary that I should receive evidence respecting the murder of P."

RULE 101. A separate crime from that charged may be shown where it is necessary to prove that the crime charged was not accidental.³

Illustrations.

I. A. is accused of setting fire to his house in order to obtain insurance money. The facts that A. had previously lived in two other houses, successively, each of which he insured and in each of which a fire occurred, and that after each of these fires A. received a payment from a different insurance office, are relevant.⁴

II. A. is employed to pay the wages of B.'s laborers, and it is A.'s duty to make entries in a book showing the amounts paid by him. He makes an entry showing that on a particular day he paid more than he really did pay. The question is whether this false entry was accidental or intentional. The fact that for a period of two years A. made other similar false entries in the same book, the false entry being in each case in favor of A., is relevant.⁵

III. The question is, whether the administration of poison to A. by Z., his wife, in September, 1848, was accidental or intentional. The facts that B., C. and D. (A.'s three sons) had the same poison administered to them in December, 1848, March, 1849, and April, 1849, and that the meals

¹ *Rex v. Cleves*, 4 Car. & P. 221 (1830).

² *State v. Watkins*, 9 Conn. 47.

³ *State v. Patza*, 3 La. Ann. 513 (1846).

⁴ *Regina v. Gray*, 4 Fost. & F. 1102; *Steph. Ev.* 23.

⁵ *Regina v. Richardson*, 3 Fost. & F. 243; *Steph. Ev.* 23.

of all four were prepared by Z., are relevant, although Z. was indicted separately for murdering A., B. and C. and attempting to murder D.¹

IV. V. is indicted for shooting at P. with intent to kill. The defense is that it was accidental. Proof that V. at another time shot at P. is admissible.²

V. R. is indicted for murdering her infant by suffocating it in bed. Proof that other children of R. have died young is admissible.³

VI. D. is charged with willfully setting fire to a rick by firing a gun into it on March 29th. Proof that the rick was also set on fire on March 28th, and that D. was then close to it with a gun in his hand, is admissible, to show that the fire on the 29th was not accidental.⁴

In cases like the above it might well happen that a man might shoot another accidentally, but that he should do so twice within a short time would be very unlikely. So it might easily happen that a man using a gun might fire a rick once, by accident; but that he should do it several times in succession would be very improbable. So a person might die of accidental poisoning, but that several persons should so die in the same family, at different times, would be very unlikely. So that a child should be suffocated in bed by its mother might happen once, but several similar deaths in the same family could not reasonably be accounted for as accidents. And so in the case of embezzlement effected by means of false entries; a single false entry might be accidentally made, but the probability of accident would diminish at least as fast as the instances increased.⁵

RULE 102. — A separate crime from that charged may be proved where it forms part of the *res gestæ*.

Illustrations.

I. A. is indicted for arson in setting fire to a rick, the property of B. Evidence of A.'s presence and conduct at fires of other ricks on the same night, the property of C. and D. is admissible.⁶

¹ *Rex v. Gearing*, 18 L. J., M. C. 215; *Steph. Ev.* 24; *Rex v. Cotton*, 13 Cox C. C. 400; *Rex v. Ganier*, 3 Fost. & F. 681.

² *Rex v. Voke*, Russ. & Ry. 531 (1823).

³ *Regina v. Roden*, 12 Cox C. C. 630 (1874).

⁴ *Regina v. Dossett*, 2 Car. & K. 306.

⁵ *State v. Lapage*, 57 N. H. 245 (1876).

⁶ *Regina v. Taylor*, 5 Cox C. C. 138.

II. S. is indicted for killing T. Proof that M. was killed at the same time, and showing the manner of M.'s injuries, is admissible.¹

“ It frequently happens that, as the evidence of circumstances must be resorted to for the purpose of proving the commission of the particular offense charged, the proof of those circumstances involves the proof of other acts, either criminal or apparently innocent. In such cases it is proper that the chain of evidence should be unbroken. If one or more links of that chain consist of circumstances which tend to prove that the prisoner has been guilty of other crimes than that charged, this is no reason why the court should exclude those circumstances. They are so intimately connected and blended with the main facts adduced in evidence that they can not be departed from with propriety, and there is no reason why the criminality of such intimate and connected circumstances should exclude them more than other facts apparently innocent. Thus, if a man be indicted for murder and there be proof that the instrument of death was a pistol; proof that that instrument belonged to another man; that it was taken from the house the night preceding the murder; that the prisoner was there on that night and that the pistol was seen in his possession on the day of the murder, just before the fatal act, is undoubtedly admissible, although it has the tendency to prove the prisoner guilty of a larceny. Such circumstances constitute a part of the transaction, and whether they are perfectly innocent in themselves, or involve guilt, makes no difference as to their bearing on the main question which they are adduced to prove.”²

There is another class of cases in which evidence of criminal acts other than the one charged is permitted to be shown. These are prosecutions for sexual offenses. Here, where the charge is that a person has committed the crime with a particular individual, evidence is admissible of acts

¹ *Commonwealth v. Sturtevant*, 117 Mass. 122 (1875).

² *Walker's Case*, 1 Leigh (Va.), 587 (1829).

of indecent familiarity other than the one in question,¹ and even proof of the actual commission of the crime at another time.² Such evidence is said to be received for the purpose of showing an "adulterous disposition." They are certainly in conflict with the general principles of the law.

Where the prisoner undertakes to prove his good character, the prosecution may, to rebut this, show that his character is bad by showing his reputation ; but not, according to the majority of the cases, particular facts

¹ *State v. Wallace*, 9 N. H. 515; *State v. Marvin*, 35 N. H. 23; *Lawson v. State*, 20 Ala. 66 (1852); *State v. Crowley*, 13 Ala. 173 (1846).

² *Thayer v. Thayer*, 101 Mass. 118 (1869), overruling *Commonwealth v. Thrasher*, 11 Gray (Mass.), 450; *Commonwealth v. Labey*, 14 Gray (Mass.), 91 (1859); *Commonwealth v. Merriam*, 14 Pick. (Mass.) 518 (1833); *Commonwealth v. Horton*, 3 Gray (Mass.), 354 (1854).

CHAPTER XX.

THE PRESUMPTIONS IN DISFAVOR OF INNOCENCE.

RULE 103. — Where no motive for the commission of a crime is shown, the presumption of the innocence of the suspected person is strengthened. But a motive being proved a presumption of guilt may arise.¹

In *Lake v. People*² it was said: "A motive for the killing is sometimes an important if not an essential point on a trial for murder. But those are cases where the evidence of the killing is circumstantial. Then it is important to show that the prisoner had a motive with a view to establishing that he is the person who committed the act. But in cases where, as in this, the killing is undisputed, the question of motive becomes less important. For the moving cause is often not very apparent; in very many cases of homicide there is no motive discernible, except what arises at or near the time of the act. Excited passions or a desire for vengeance for a real or imaginary insult or wrong not unfrequently lead to the crime. If a case should arise where it was absolutely certain there was no motive whatever for the commission of the crime it would undoubtedly tend to show insanity, for insane persons are the only ones that act without motives. But who can say there is no motive? Who can fathom the mind of the accused and ascertain that there is no hidden desire

¹ *Somerville v. State*, 6 Tex. (App.) 423 (1879); *Smith v. State*, 8 Tex. (App.) 23 (1880); *Yauke v. State*, 51 Wis. 466 (1881); *Overstreet v. State*, 46 Ala. 30 (1871); *Flanagan v. State*, 46 Ala. 708 (1871); *Kelsoe v. State*, 47 Ala. 573 (1873). "The existence or want of motive to commit the crime alleged, is always a legitimate subject of inquiry. In cases depending upon circumstantial evidence, it is sometimes of vital importance. But it is never indispensable to a conviction that a motive for the commission of the crime should appear." *People v. Robinson*, 1 Park. C. C. 649 (1854).

² 1 Park. C. C. 539 (1854).

of vengeance, no envy or avaricious passion to be gratified? There is no rule of law which determines what is an adequate motive, even where it is necessary to show one. One man will kill another to obtain \$1,000, another may do the same for a tenth or even a hundredth part of the sum; in each case it is adequate in one sense for the mind on which it operates. But in truth and in another sense no amount is adequate to induce a reasonable man to take the life of another; nothing will induce a reasonable man to commit murder; it is idle to talk, therefore, about an adequate motive for a reasonable man. What motive appears in the present case? The motive said to be assigned by the prisoner himself is the desire on his part to obtain certain papers of title which the woman refused to deliver up. The theory of the prosecution is that there was a controversy, a bone of contention touching the title to the place, which furnishes the basis of disagreement, quarrels, exasperation, and finally personal violence. If this be so, it would undoubtedly have a tendency to show a motive such as may be fairly supposed to have induced the act. For slight causes of contest, however unreasonable or unjust, may be made the ground work of irritations which may be wrought up by the untoward circumstances between irascible dispositions, until one of them may reach the point of uncontrollable passion, or in other words, the killing point. But it is contended by the defense that even admitting a sufficient motive as to the woman, there could not be any occasion for destroying the children. It is undoubtedly contrary to the general course of nature for a man to murder inoffensive children, and especially when they are his own. But there is another principle recognized as pertaining also to human nature, and that is that hatred for the parent is often extended to and visited upon the offspring, and the same ungovernable rage which would destroy the mother might impel the offender also to involve her descendants in the common ruin; upon the principle that they were a part and portion of the detested mother, or as the

prisoner expressed it, 'as he had commenced the job he thought he would finish the breed.' "

And that the prisoner has committed other crimes may be shown to evidence his motive.¹ "Motive is a minor or auxiliary fact from which, when established in connection with other necessary facts, the main or primary fact of guilt may be inferred, and it may be established by circumstantial evidence the same as any other fact. The proper inquiry when the circumstance is offered is, does it fairly tend to raise an inference in favor of the existence of the fact proposed to be proved? If it does it is admissible whether such fact or circumstance be innocent or criminal in its character. It does not lie with the prisoner to object that the fact proposed as a circumstance is so heinous in its nature and so prejudicial to his character that it shall not be used as evidence against him if it bears upon the facts in issue. The atrocity of the act can not be used as a shield under such circumstances or as a bar to its legitimate use by the prosecution. If it could many criminals might escape just and merited punishment solely by means of their hardened and depraved natures. The rule appears to me to be well settled, both by elementary writers and by adjudged cases, that separate and distinct felonies may be proved upon a trial for the purpose of establishing the existence of a motive to commit the crime in question even though an indictment is then pending against the prisoner for such other felonies."

Sub-Rule 1.—*A motive is proved by showing the desire of gain (A), the gratification of passion (B), or the preservation of reputation (C), accomplished or attempted or able to be accomplished by the perpetration of the crime charged.*

Illustrations.

A.

I. A poor Italian boy is killed by a man in the streets. The motive is to sell his body to a medical college.²

¹ *People v. Wood*, 3 Park. 681 (1858).

² *R. v. Bishop*, 3 Lond. Leg. Obs. 89.

II. A. enters a house in the night and kills B., the owner. A.'s motive is to possess himself of a sum of money which B. always keeps in a bag under his pillow.

III. An old lady possessed of some money goes to board with B., who keeps a boarding-house. B. kills her, B.'s motive being to possess herself of the goods of the old lady, she having no friends to claim them.¹

IV. P. boarded with his employer, and for a long time had been gradually by fraud obtaining the control of the business. His scheme might be frustrated by its being discovered by the employer. Here is a motive in P. to kill his employer.²

V. R. was a debtor of D. who held a bond and mortgage on his house. R. was in bad circumstances. R. killed D. and seized the papers. Here the motive is apparent.³

VI. C. poisons her father. By the death of her father, C. who is married, falls into a large fortune. This is C.'s motive.⁴

VII. S. expected to inherit a large estate from his sister, a maiden lady well on in years. Suddenly the sister formed an attachment for one F. and told S. she intended to marry him. A quarrel ensued between brother and sister. The latter subsequently married F., and some months later S. killed F.⁵

VIII. H. is indicted for murdering his wife. That by a will of her father H. was entitled after her death to a part of the father's estate is relevant on the question of motive.⁶

IX. A. is accused of having set fire to his own house. It is proved that shortly before the fire A. had insured it far beyond its value. A motive in A. to burn his house may be properly presumed.⁷

Case I. illustrates the rule that the motive of unlawful gain is not to be judged by the amount of money to be had from the commission of the crime. Here the body was sold to the authorities of the college for less than fifty dollars; and in another case, the teeth of a similar victim were dug out of his jaws and sold to a dentist for three dollars.

¹ R. v. Burdock, Best on Pres., sect. 196.

² R. v. Patch, Wills Circ. Ev. 230.

³ State v. Robinson, Burr. Cir. Ev. 288. A similar motive is found in Com. v. Webster, tried for the murder of Prof. Parkman, Bemis' Report, 565; R. v. Harrison, 12 How. St. Tr. 833 (1692).

⁴ R. v. Blandy, 8 How. St. Tr. 1118 (1752); Margaret Gottfried's Case, 4 Leg. Obs. 101; R. v. Stansfield, 11 How. St. Tr. 1371.

⁵ Strangways' Case, 5 Leg. Obs. 90.

⁶ People v. Hendrickson, 1 Park. C. C. 422 (1866).

⁷ Best Ev., sect. 453; and see State v. West, 1 Houst. Cr. Cas. 282.

Case II. is the common one of the burglar who, knowing that some money is to be had, takes the risk as to the quantity being great or small.

Case III. is an example of those cases where the property of another has been brought into the criminal's possession, and can be held there but for the victim's presence, and case IV. is of the same kind.

Analogous to these is case V.

In case VI. we have the motive which prompts the remainder-man to wish the death of one who holds the life estate — the case of "dead men's shoes."

Case VII. shows a motive of the same character — to prevent an expected inheritance from being lost.

In case VIII. it was said: "The evidence was received as bearing upon the question of motive. If it tended in the least to show that the prisoner had been disappointed in the pecuniary expectations he had entertained from his alliance with the family in not being able to realize them until after the death of his wife's mother, and then not in an equal proportion with the brother; or if it tended to show how little property he might expect from his wife if she lived — in either case whether the supposed motive was resentment or avarice it was properly received. It was competent to show whether the prisoner would gain or lose by the death of the deceased, and to compare the small amount expected to be realized at a distant day with the intermediate burden of her maintenance. Taken in connection with the previous testimony tending to show a want of affection on the part of the prisoner toward his wife, this evidence was clearly admissible. Considerable latitude is allowed on the question of motive. Just in proportion to the depravity of the mind would a motive be trifling or insignificant which might prompt to the commission of a great crime. We can never say the motive was adequate to the offense; for human minds would differ in their ideas of adequacy, according to their own estimate of the enormity

of crime and a virtuous mind would find no motive sufficient to justify the felonious taking of human life.”

B.

I. K. poisons his wife. It is proved that while his wife was alive he made offers of marriage to one Nancy H., who objects on the ground that he is married. He endeavors to get a divorce from his wife, but fails. The motive is apparent.¹

II. K. is married to J., who is much older than she. K. becomes enamored of P., J.'s younger brother. K. kills J. by poisoning him.²

III. W. is indicted for the murder of his wife. Proof of an adulterous intercourse between W. and another woman is relevant on the question of motive.³

IV. J. is indicted for poisoning his wife. The fact that J., during the year preceding the murder, asked Mrs. B. to permit him to visit one of her daughters, she refusing because he was married, is admissible as showing a motive in J. for getting rid of his wife.⁴

V. G., aged twenty-two, was married to a girl of the same age on Sunday. On the next Friday she was taken sick and died the following Monday. On the trial of G. for poisoning his wife, the facts that the marriage was in haste and after a very brief acquaintance, that the family of G. opposed it, and that G. still kept the society of a former sweetheart, are relevant on the question of motive.⁵

VI. J. was indicted for poisoning his wife. The fact that she for some time previous had been compelled by J. to sleep in his kitchen, which was very open and stood apart from the house in which J. and his children lived, is admissible as showing a motive for her death.⁶

VII. F. is engaged to marry a young woman. He goes to a distant town to improve his situation, and while there his *fiancée* makes the acquaintance of W., to whom she becomes engaged. On January 2d F. receives a letter from the young woman returning his presents and announcing that she is to be married on January 10th. F. starts back,

¹ *People v. Kelsner*, 8 Wheel. Cr. Cas. 40 (1817); *Margaret Gottfried's Case*, 4 Leg. Obs. 101; *Adams' Case*, 11 Leg. Obs. 415; *People v. Grunsig*, 2 Edm. Sel. Cas. 238 (1851).

² *R. v. Nairn*, 19 How. St. Tr. 1296; *Mrs. Adams' Case*, 5 Leg. Obs. 59; *Mrs. Spooner's Case*, 2 Chand. Cr. Tr. 1; *Pierson v. People*, 18 Hun, 239 (1879).

³ *State v. Watkins*, 9 Conn. 47; *Templeton v. People*, 27 Mich. 501 (1873); *St. Louis v. State*, 8 Neb. 405 (1879).

⁴ *Johnson v. State*, 17 Ala. 623 (1850).

⁵ *People v. Green*, 1 Park. C. C. 32 (1845).

⁶ *Johnson v. State*, 17 Ala. 623 (1850).

and on the morning of January 10th waylays W. and kills him. The motive here is jealousy.¹

VIII. H. is indebted to C. C. is a hard creditor and refuses his offers of compromise. H. complains of and is exasperated at C.'s conduct and finally kills him.²

IX. S. was engaged by the agent (G.) of an estate to manage it. S. was subsequently removed from his position by the agent, and the tenants whom he had obtained were likewise evicted. S. killed G.³

X. C. is a litigant. A decree is rendered against him which he considers unjust, and for which he threatens to kill the judge. He afterwards goes to the judge's house and shoots him dead.⁴

XI. The question is whether B. or some one else is the murderer of B.'s wife. The fact that B. and his wife had, one year previous to the killing, quarrelled and separated is relevant as showing a motive in B.⁵

XII. G. wishes to marry. G.'s parents oppose the match. G. poisons her parents.⁶

In case I. it was said: "The motive which induces the commission of the highest offenses and especially of the crime of murder is always required to be ascertained. And here we are constrained to say that in the case under consideration, the motive is but too clearly found in the testimony of Nancy H.; to this woman the convict had made offers of marriage and when she says that in those offers she gave him no great encouragement we are led to the conclusion that his marriage to the deceased was the great, if not the only objection; and experience has shown that men, unrestrained by a sense of religious and moral obligation when placed in this situation, have been impelled to the perpetration of the most deadly crimes." And in a similar case the court said:⁷ "The defendant was charged with the murder of his wife. The marital relation existing between them furnished a strong presumption in favor of his innocence. In the

Oom. v. Fuller, 2 Wheel. Cr. Cas. 223 (1820).

² *People v. How*, 2 Wheel. Cr. Cas. 223 (1824).

³ *Stewart's Case*, 19 How. St. Tr. 179. And see *People v. Breen*, 4 Park. C. C. 380 (1860).

⁴ *Chislle's Case*, 9 Leg. Obs. 186.

⁵ *Baulam v. State*, 17 Ala. 451 (1850).

⁶ *Margaret Gottfried's Case*, 4 Leg. Obs. 101; *R. v. Blandy*, 18 How. St. Tr. 1117.

⁷ *People v. Hendrickson*, 1 Park. C. C. 415 (1853).

absence of proof to the contrary, it was to be presumed that he loved her and would protect her. It was important, therefore, for the prosecution, if it could, to repel this presumption by proof that the defendant had disregarded the claims of connubial duty. For this purpose evidence tending, however slightly, to show an alienation of affection — any thing from which a jury might infer a desire to be free from the burden of one who was no longer the object of regard, was competent. Suppose it could have been proved that the defendant had said that he hated his wife and wished to be rid of her, would any one doubt that this might be proved to rebut the presumption that he loved her? So any conduct or declaration evincing unkindness or disrespect, though less decisive in their character as evidence, were admissible as tending to show the state of the defendant's feelings towards his wife."

In case IV. the ruling of the Connecticut court in *State v. Watkins* was approved. "It is stated," said the court, "that this decision produced surprise. But the point we have to discuss is not the same that was decided by the Supreme Court of Connecticut. If it were it is probable we should concur in opinion with that court, and hold also that it was evidence of a motive for the murder of his wife. In this case the prisoner applied to a woman for permission to visit her daughter. There can be no doubt about the criminal object of his visits. He was denied the privilege because he was a married man; there was no other objection. Now there was an object of desire, of criminal desire, but his wife stood between him and it. This as a motive for her destruction was clearly admissible in evidence, because motives for every crime may be proved."

In case V. the jury were told: "Where a murder is charged and the evidence is wholly circumstantial, then it is always peculiarly proper to look at the motive. And in all cases you will naturally seek for the motive. And where the proof is circumstantial, and there be doubt about the circumstances, then it becomes most important

to examine into the motive. If, however, the evidence of murder by design be direct and positive, then the guilt is established without looking further. And in all these cases a question as to the adequacy of motive almost always arises. It is claimed generally that the motive was inadequate, that it is not sufficient to induce to the commission of murder. But all this must depend on the peculiar circumstances of each case, and the peculiar character of the accused. There is no motive which to the mind of an honest man can be adequate to the commission of crime; and just in proportion as the mind is debased and immoral, to that extent the motive may be less which induces the criminal act. Hence, there can be no one rule for all cases, as regards adequacy of motive, it must depend on the moral character of the person accused in each case. The worse it is the less the motive which will tempt to the commission of crime. It is urged, and very plausibly on the part of the prisoner, that the relation existing between him and the deceased forbids the supposition that he could have murdered her; that they were just married, and had barely entered on that important and interesting relation in life, and that it could not be supposed under the circumstances detailed that the prisoner could for a moment have entertained the idea of taking the life of the young woman whom he had so recently sworn at the altar to love, cherish and protect. This consideration has weight, and you are to consider carefully this and all other circumstances favorable to the prisoner, and to give them their full and due weight, comparing them at the same time with the other evidence in the case. It is urged by the prosecution that the prisoner's acquaintance with the girl he afterwards married was of short duration; that he had known her but a few weeks; that in fact he married her a week before the time appointed. And it is claimed that the marriage was not agreeable to other members of his family. * * * And it is claimed on the part of the prosecution that they have proved that there was a bad feeling existing on the part of

the mother of the prisoner in regard to this marriage of her son. * * * Now this is evidence — legitimate evidence. You are to say to what weight it is entitled. * * * It is urged by the prosecution, also, that this match thus hastily and prematurely entered into did not indicate that desirable and abiding affection which is supposed to be incompatible with the feeling that induced the commission of this crime; and that a former attachment to Miss Godfrey (the same one that went with him after his marriage, on the sleigh ride), still lingered about the prisoner, and prompted him in connection with his interview with his mother to the commission of the act for which he is arraigned. You must look at this question of motive and give it due weight.”

In case VI. it was said: “This was evidence tending in no inconsiderable degree to prove that he had become tired of his wife and hence had a motive for putting her out of the way. It is clear that the crime of willful murder had been committed by some one. This having been established, and the prisoner being charged with the crime, every ground from which a motive could arise may be proved against him. It is not necessary to speak at present of the weight of such a circumstance. With regard to the grounds from which a motive may be inferred, we may remark that the law has never limited them, and never can limit them in number or kind, and it is immaterial whether the motive be wealth, as if the slayer should become entitled to an estate by reason of the death of the party slain, or to get the party slain out of the way for any other purpose, as to prevent him from giving evidence in a cause. No matter what the object in view, if it can form a motive for the act it may go to the jury. On the one hand, the jury should receive it always with caution; but on the other it need not be such a ground for motive as might be deemed sufficient to induce a just and honest man to perpetrate a high crime.”

On the trial of case IX., in charging the jury, the judge said: “Very strange causes it must be confessed for the

pannel's (prisoner) conceiving a violent and even a mortal enmity against Glenure. And yet nothing is more certain than that violent offense may be taken where no just or even plausible cause for it hath been given; and from the first murder recorded in sacred history down to this now in question often hath it happened that wicked men have hated their brothers without a cause, that is without a reason or just cause, though there was always an occasion or motive, such as it was, for the hatred being conceived. Again it is to be considered that occasions of offense operate differently according to the education, temper and character of the party who meets with them; and we have now heard from the evidence in this trial what a wrong way of thinking this unfortunate pannel is possessed of, in holding it to be a cause of mortal enmity that a man should be removed by another from his farm or possession which he hath no manner of title to hold or retain; which is a prejudice or delusion that in a lower degree prevails elsewhere, but seems to be in a particular manner prevalent in the Highlands, and was the cause of the attempt made by the Macphersons to assassinate Glenbucket some years ago, as well as the cause of the horrid murder into which you are now inquiring."

Case X. occurred in Scotland in the year 1689, the victim being Sir John Lockhart, Lord President of the Scottish Court of Session. Instances of this kind of motive are few, the most recent being the killing of Judge Elliott, of the Court of Appeals of Kentucky, by a man named Buford, who had been unsuccessful in a case before that tribunal, three or four years ago. More fortunate than Chislie, the murderer of the Lord President, was Buford. Chislie's sentence was "that he be carried on a hurdle from the Talbooth of Edinburgh to the Market Cross, on Wednesday, the 3d of April inst. (he was tried on the 31st of the previous month), and there, between the hours of two and four of the afternoon, to have his right hand cut off alive, and then to be hanged upon a gibbet with the pistol about his neck with which he committed the murder. His body

to be hung in chains between Leith and Edinburgh; his right hand fixed on the west fort, and his movable goods to be confiscated." Buford was sent to an asylum, which he voluntarily left after a few months.

"When," it was said in case XI., "a crime has been committed, and circumstances point to the accused as the guilty agent, then proof of a motive to commit the offense, though weak and inconclusive evidence, is nevertheless admissible. On the other hand, the total absence of all motive or reason why the accused should do the act must always operate strongly in his favor where the inquiry is whether the accused perpetrated the deed, and the evidence to prove his guilt is circumstantial only. But it must be apparent that if a motive be evidence in such cases to be weighed by a jury, then evidence tending to prove the existence of the motive can not be rejected. It may, however, be well to remark that a jury can not be too cautious in attaching importance to such evidence, for if the motive itself is a weak and inconclusive circumstance, how much less conclusive is the evidence which only tends to prove the existence of the motive? Such evidence, however, can not be wholly rejected; it must go to the jury, but they should be guarded as to the importance they attach to it. The testimony objected to shows that the prisoner and the deceased had lived together as husband and wife, but about a year before the homicide had quarreled and separated, and there was no proof to show that their relations had been restored or that a reconciliation between them had ever taken place. The evidence, therefore, tended to prove a state of ill feeling or hatred from which not unfrequently springs the spirit of revenge for either fancied or real wrongs. Had there been no other circumstances implicating the accused as the guilty agent, such proof could have had no legitimate influence and might well have been rejected. But as other circumstances did exist pointing to the prisoner as the perpetrator of the crime, the court violated no rule of law in admitting it to the jury. It is

however, urged that if the two quarrel, and subsequently are reconciled to each other, the law will not presume that malice exists between them. This is true, and the law probably would not have presumed malice or even ill feeling between the prisoner and the deceased from their former relations and their quarrel and separation. But there is a wide difference between the presumptions of law and the presumptions of fact. The law draws no presumption or inference but from facts which, unexplained, are conclusive of guilt. But presumptions of fact are to be drawn by the jury, and every fact that tends to prove the guilt or to prove any fact that is evidence of guilt, however conclusive such fact may be, is admissible evidence. The prisoner could have destroyed the entire weight of this evidence by proving that subsequent to his quarrel and separation from the deceased a reconciliation had taken place, if indeed such had been the case. This, however, he did not attempt to do."

C.

I. R. is a clergyman, who while in another and former parish, had seduced a girl and got her with child. One day this girl appears at R.'s house, demands money, and threatens to expose him. R. takes her to his room and cuts her throat with a razor.¹

II. C. is indicted for the murder of H. The fact that C. had previously employed H. to murder one P., shows a motive for the crime and is relevant.²

III. D. is indicted for the murder of W. The fact that D. had previously been implicated in the murder of E. and that W. was at the time of his death endeavoring to discover the murderers of E. is relevant as showing a motive.³

IV. T. is indicted for the murder of W., a female. The fact that T. had previously maintained criminal relations with W. is relevant on the question of motive.⁴

¹ *Riembauer's Case*, 3 Leg. Obs. 242. And see *R. v. Richardson*, Burr. Cir. Ev. 242.

² *Rex v. Cleves*, 4 C. & P. 221 (1830).

³ *Dunn v. State*, 3 Ark. 227 (1839).

⁴ *Turner v. Com.*, 86 Pa. St. 54 (1873).

V. The question is whether M. is the murderer of R. The fact that R. and M. were under indictment together for larceny and that R. had turned State's evidence before the murder, is relevant as showing a motive in M. to kill R.¹

VI. S. is indicted for the murder of L. who was married to S.'s sister. The fact that S. and his sister had been guilty of incest which was known to L. shows a motive and is relevant.²

RULE 104. — Proof of opportunity possessed by the accused to commit the crime may raise an inference that he is the criminal (A). But another may have had a better opportunity than even the accused; and the possibility of such a circumstance should weaken the presumption (B).

Illustrations.

A.

I. A. is indicted for poisoning B. The fact that A. lives in the same house with B., and had opportunities for tampering with his food and drink is relevant.³

II. T. is indicted for entering U.'s room in the night and stealing his money. The fact that T. is a lodger in the same house is relevant as showing an opportunity.⁴

III. S. is found dead in a house. R. is seen coming out of the house with a bloody sword in his hand. The presumption is that R. has killed S. This is the violent presumption of Sir Edward Coke.⁵

IV. H. is indicted for the murder and robbery of A. It is proved that some months before H. said to a witness: "Don't you reckon that if any one was to run in on old man A. he would get a handful of money." This declaration is relevant as showing opportunity and knowledge.⁶

B.

I. One Sunday morning when the whole of a household except T., a female servant, was absent at church, the house was robbed, and a small cabinet containing jewels and gold coin to a very large amount

¹ *State v. Morris*, 84 N. C. 756 (1881).

² *People v. Stout*, 4 Park. 71 (1868).

³ *Burr. Ev.* 356.

⁴ *Id.* 357.

⁵ *Coke Litt.* 65.

⁶ *State v. Howard*, 82 N. C. 627 (1880).

taken and carried away. T. maintained that no one had entered or gone out of the house during the time of the family's absence. T. was convicted of the robbery. Many years after as T. having served out her sentence was going through the market a butcher tapped her on the shoulder and said in a half whisper and an ironical tone of voice: "Ah! what a creature is a naked woman." T. remembering that she had made that remark to herself on the morning of the robbery, the butcher was arrested. He confessed that his master served the house with meat, and having forgotten to take some minced veal home on Saturday evening as he should have done, he carried it in a large basket on Sunday morning. The family had gone to church; T. was upstairs, and setting the meat in the usual place, he pretended to go directly out, and to shut the door after him, instead of which he shut himself in and pulling off his shoes crept softly up to the garret waiting for T. to come up to her room. T. presently came up to change her clothes, and unconscious that any human being was near her, being entirely undressed and contemplating her naked figure uttered the exclamation above, which being plainly overheard by the butcher, he immediately went through the house and took what he wanted, escaping by the back door before T. was through her toilet.¹

II. A female servant was charged with having murdered her mistress. No persons* were in the house but the deceased and the prisoner and the doors and windows were closed and secured as usual. The presumption being that no one else could have had access to the house, the prisoner was convicted and executed. It afterwards appeared by the confession of one of the real murderers that they had gained admittance into the house which was situated in a narrow street by means of a board thrust across the street from an upper window of an opposite house, to an upper window of that in which the deceased lived; and that having committed the murder they retreated the same way leaving no traces behind them.²

RULE 105. — Proof of a former attempt by the accused to perpetrate the same crime in the same or in a different manner raises an inference of his guilt as to the latter crime.

Illustrations.

I. A. is indicted for poisoning his wife by giving her laudanum. The fact that A. had on a former occasion given her laudanum, which made her sick, is relevant.³

¹ Taantje's Case, Phill. Circ. Ev. XXXVIII.

² Best Ev., sec. 453.

³ Johnson v. State, 17 Ala. 623 (1850).

II. A. is charged with setting fire to his house in order to obtain the insurance money. The fact that A. had previously set fire to his house, or that fire had previously occurred there, is relevant.¹

III. Z. is charged with poisoning A., her husband. The fact that Z. had previously put poison in the food of the family is relevant.²

IV. V. is indicted for shooting at P. with intent to kill him. Proof that V. at a previous time had shot at P. is relevant.³

V. D. is charged with having willfully set fire to a hay stack. The fact that on a previous day the rick was seen to be on fire, and D. to be near it, is relevant.⁴

In case I. it was said: "If his former attempt to poison his wife had been proved by a witness on the trial, the question of the admissibility of the evidence would have been different. It might then have been very material to inquire whether he gave her the poison for which she is indicted innocently or criminally. It is very usual for the head of a family to administer medicine in the domestic circle, but in doing so, if he should poison the patient, his intention would be very material. In such case it would deserve consideration if a former attempt to poison the patient might not be proved, although of itself a distinct felony, for the purpose of showing his guilty knowledge in the last instance."

RULE 106. — Proof of preparations on the part of the accused to accomplish the crime charged, (A) or to prevent its discovery, (B) or to aid his escape, (C) or to avert suspicion from himself, (D) raises a presumption of his guilt.

Illustrations.

A.

I. A. is accused of the murder of B. by poison; C. of the murder of D. by shooting; E. of committing a burglary; F. of arson; G. of counterfeiting. The fact that A. had previously purchased some poison; that

¹ Reg. v. Gray, 4 F. & F. 1102.

² R. v. Gearing, 18 L. J. (M. C.) 215; Mrs. Arden's Case, 5 Leg. Obs. 59.

³ R. v. Voke, R. & R. 531 (1923).

⁴ R. v. Dorsett, 2 C. & K. 305.

C. had bought, borrowed, or stolen a gun or pistol; that E. had procured an ax, a picklock, or a dark lantern; that F. had procured a quantity of turpentine; that G. had made an instrument to manufacture coin, are relevant and raise an inference of fact of guilt in each case.¹

II. K. is accused of the murder of A. by stabbing him. The fact that K. had previously taken a sword to a cutter, telling him that he wanted it ground "as sharp as a carving knife," as he wished to use it as a carving knife, is relevant.²

III. F. is accused of the murder of W. by shooting him with a pistol. The fact that F., a few days prior, had procured a pistol and had spent some time practicing at a mark is relevant.³

IV. S. was indicted for murdering R. by shooting. The fact that a day or two previous S. had borrowed a gun from a friend, stating that he wanted it to kill deer with, is relevant.⁴

B.

I. An inn-keeper and his wife are accused of the murder of a guest. It is shown that the night the murder was committed they sent the maid-servant out of the house, and when she returned made her sleep in another part of the building. This is relevant.⁵

C.

I. A. was charged with the murder of T. The fact that the day before the murder A. had drawn a quantity of money from a bank in which he had it on deposit, is relevant, as raising an inference that he was preparing to escape, if necessary, from the country.⁶

D.

I. B. and P. lived in the same house, and the former, while sitting one evening in his parlor, was shot by a pistol in an unseen hand. A few evenings before, and while B. was away from home, a loaded gun or pistol had been discharged into the room in which the family when at home usually sat and passed their evenings. This shot, P. claimed at the time, had been fired at him, but it turned out to have been fired by him.⁷

¹ See cases *passim*. *R. v. Hill*, 20 How. St. Tr. 1317; *People v. Feyerly*, Burr. Ev. 347.

² *R. v. Corder*, Phill. Tr. 221.

³ *Com. v. Fuller*, 2 Wheel. 233 (1820); *R. v. Barbot*, 18 How. St. Tr. 1261 (1753).

⁴ *Strangeway's Case*, 5 Leg. Obs. 91.

⁵ *Drayne's Case*, 5 Leg. Obs. 128 (1654); *Ferrer's Case*, 19 How. St. Tr. 904.

⁶ *Adams' Case*, 11 Leg. Obs. 415 (1835).

⁷ *Patch's Case*, London, 1808.

II. A. is accused of the murder of B. It is proved that A., some time previous, had spread a rumor that on account of ill-health B. would not be likely to live very long.¹

III. S. was charged with the murder of T. On the night of the murder S. left a friend at his lodgings, getting him there secretly, so that the people of the house would think S. at home when he was absent. This is relevant.²

In case I., P.'s object in representing that the first shot was fired by himself was to induce B., the servants, and the officers of the law, who would subsequently be called on to investigate the crime, to believe that assassins were prowling around the building, and to lay upon them the guilt of the killing of B.

The object of such statements, as in case II., is to prepare the minds of the friends and neighbors of the deceased for the event, and by diminishing surprise to prevent investigation into its cause.

Sub-Rule 1. — *But Rule 106 does not apply where the preparations may have been innocent (A) or for the execution of something different though illegal, (B) or where the crime for the execution of which the preparations were made may have been subsequently frustrated or voluntarily abandoned (C).*

Illustrations.

A.

I. A. is indicted for murdering B. by poisoning him. It appears that shortly before, A. purchased a quantity of poison. This raises an inference of guilt. But it appears that A. had purchased the poison for no other reason than to kill vermin. This overthrows the inference of guilt.³

II. A. is accused of the murder of B. It is proved that A. sometime previous had spread a rumor that on account of ill health B. would not be likely to live long. It turns out that A. was really speaking the conviction of his own mind. This destroys any inference of guilt.⁴

¹ Best Ev., sec. 455.

² Strangeway's Case, 5 Leg. Obs. 51.

³ Best Ev., sec. 456.

⁴ *Supra*.

B.

I. A. is found killed by a bullet from a gun. It is proved that B., a neighbor, had purchased a gun the day before, and another neighbor C., is found with a gun in his possession. The facts that B. had purchased the gun for the purpose of poaching or that C. had stolen the gun to go hunting with, explain the circumstances.¹

C.

I. A. prepares poison with which to kill D. Before he uses it he repents of his crime, and abandons the idea of killing D. This overthrows the inference arising from the purchase of the poison.²

II. B. was an inn-keeper. One night one H. put up at B.'s inn having, before he retired to bed, remarked that he was carrying with him a large sum of money. Two guests in an adjoining room were wakened in the middle of the night by groans and rushing into H.'s room found H. weltering in blood and a man standing over him with a dark lantern in one hand and a knife in the other. On being seized the man turned out to be B., and he was tried and executed, though maintaining his innocence to the last. Afterwards it was established that the murder had been committed by H.'s servant, who had left the room but a few seconds before B. entered it for the same purpose.³

RULE 107. — Threats or expressions of ill will on the part of the accused concerning the victim are relevant on the question of his guilt.

Illustrations.

I. W. is charged with the murder of A. The fact that W. had been heard to say of A. that he "is a cursed villain and the greatest enemy I have," is relevant.⁴

II. A son is accused of murdering his father. He has been heard to declare that "he hated his father these six or seven years." This is relevant.⁵

III. A woman and her paramour were accused of murdering her husband. She had been heard to say of her husband that "she lived a most unhappy life with him and she wished him dead, or if that could not be she wished herself dead." This is relevant.⁶

IV. H. is accused of murdering J. The fact that before the murder

¹ Best Ev., sec. 456.

² Best Ev. 457.

³ Bradford's Case, Phillips' Cas. on Circumstantial Evidence, XXVI.

⁴ People v. How, 3 Wheel. 415.

⁵ R. v. Standsfield, 11 How. St. Tr. 1397.

⁶ R. v. Ogilvie, 19 How. St. Tr. 1290.

H. was heard to say of J.: "He deserves to have his throat cut" is relevant.¹

V. J. is indicted for the murder of W. The fact that J. sometime previous had said that he intended to "lay for W. if he froze the next Saturday night," is relevant.²

VI. H. is charged with the murder of M. H. has been heard to say of M.: "If he don't do as he has agreed I will kill him." This is relevant.³

VII. A woman was charged with the murder of her husband. She had previously expressed her hatred of him and said: "If she had a dose she would give it to him." This is relevant.⁴

VIII. S. was found dead in a well. It is proved that some time previous T. had said that he would put S. "in the well for two coppers." This is relevant on the trial of T. for the murder of S.⁵

IX. R. is indicted for the murder of S. Before the murder R. was heard to say of S.: "I will kick hell out of her. I will break her damned neck." This is relevant.⁶

In case IX. it was said: "Threats are significant. Out of the abundance of the heart the mouth speaketh. Threats unexecuted amount to nothing, but when the thing threatened is done, and is done as it was threatened, then the fact of the threat becomes an article of circumstantial evidence tending to inculcate the person threatening. 'I will break her damned neck.' The dislocated neck of the victim of wrath and violence, her beaten and bruised body, show that what was threatened was done. The question is was it done by the prisoner who thus threatened, or by some one else from whose lips no threats proceeded."

Sub-Rule 1. — *But threats, though made by the accused, are no evidence of his guilt where a person other than himself may have carried them out.*

Illustrations.

I. A woman of bad character one day in the open street threatened a man who had provoked her in some way that he "would get his hams

¹ R. v. Harrison, 12 How. St. Tr. 841.

² Jim v. State, 5 Humph. 146 (1844); Respublica v. Bob, 4 Dall. 145 (1794).

³ People v. How, 2 Wheel Cr. Cas. 412.

⁴ R. v. Ogilvie, 19 How. St. Tr. 1273.

⁵ Mrs. Spooner's Case, 2 Chand. Cr. Tr. 14.

⁶ State v. Reed, 62 Me. 130 (1874).

cut across for him before long." A short time afterwards this man was found dead with his hams cut across. The inference was that the woman had killed him, and she was convicted and executed. Afterwards the true murderer confessed the crime—an enemy of the victim who happening to hear the threat uttered as he was passing along the street, took advantage of the circumstance to carry out his revenge in the manner described by the woman, well assured that the woman's bad character would immediately direct towards her the attention of the officers of justice.¹

II. A landlord's life is threatened by exasperated tenants and debtors. The landlord is subsequently murdered by a debtor who has made no open threats.²

RULE 108.—Possession by the accused of the means for committing the crime charged raises a presumption of his guilt (A.) And this presumption may be strengthened or weakened according to the occupation, character or sex of the accused. (B.)

Illustrations.

A.

I. A. is indicted for counterfeiting. The fact that instruments intended for the making of spurious coin are found in A.'s possession raises an inference of his guilt.³

II. A. is indicted for coining. The fact that in A.'s house are found instruments fitted for coining raises a presumption of guilt.⁴

III. B. is indicted for poisoning C. The fact that a quantity of the same powder which was found in the stomach of C. was also found in the possession of B. is relevant.⁵

IV. A. is indicted for the murder of B. The possession by B. after the crime of the instrument with which the deed was committed raises an inference of guilt.⁶

In case I. it was said: "When the criminal law writers say that you shall not give in evidence the stealing of, one

¹ Best Ev., sec. 458, note.

² This was the fact in the celebrated case of the killing of Parkman by Prof. Webster. Best Ev. (Morg. ed.), sec. 458, note.

³ State v. Antonio, 2 Const. (S. C.) 778 (1816).

⁴ Murphy's Case, 4 City Hall Rec. 43; Commonwealth v. Williams, 2 Cush. 583.

⁵ Burr. Ev. 363.

⁶ B. v. Thurtell, Phil. Tr. 7.

article upon an indictment for stealing another, the reason is obvious: because the articles being separate and distinct in their nature and the subject of different felonies, the party, though innocent, might be convicted; for he would not be prepared to defend himself against the larceny of any other article than that specified in the indictment. The rule of law in larceny is, that if an article which has been stolen be found in the possession of one who will not or can not account for the possession, that he shall be adjudged to be the thief. But it is contradictory to common sense as well as common justice to apply a rule where a man had not had an opportunity of accounting for the possession. But when a man is charged with coining and passing coin, can there be a more direct mode of proving his guilt than by producing the instrument with which the coin was made? Would it operate as a surprise? Surely the connection between the offense and the instrument is such that the accused would naturally be prepared to account for the possession of the latter when he came prepared to defend himself against the former." And Bay, J., added: "The court admitted that one felony could not be given in evidence to support another; as, for instance, the stealing of a horse could not be given in evidence to prove a man guilty of stealing a negro, because they are separate and independent offenses, both susceptible of external proof. But when a *scienter* was to be proved it must be drawn from circumstances. This species of evidence lies deep in the human heart beyond the reach of mortal ken. To find out this knowledge, therefore, is always a difficult research, and it must be drawn from circumstances indicative of the operations of the mind, and at last a reasonable presumption is all that can be obtained or acquired; all the legislators and lawyers on earth can go no further. It was, therefore, under these impressions that the court permitted these forging instruments found in the prisoner's possession to be given in evidence to the jury, not, as has been stated, to prove the

offense of passing the counterfeit money, but as a circumstance to show that he must have had a knowledge of the baseness of the metal of which the false dollar was composed. And unless circumstances of this kind or those of a similar nature were permitted to be given in evidence to a jury, all that class of cases or offenses where a knowledge of the falsehood, of any kind or nature whatever, forms or constitutes the principal ingredient of the offense, must fall to the ground, and the means of punishment must become useless and inoperative.”

B.

I. A. is indicted for burglary. In A.'s possession are found a number of keys, of moulds for making keys, and of picklocks. This raises an inference of guilt. But it is proved that A. is a locksmith. This will, as a rule, overcome this inference.¹

II. Both B. and D. are suspected of having poisoned C. In the possession of both, poison is found. B. is a physician D. is a woman. The inference of guilt from possession of means is very strong as to D. and very weak as to B.²

III. F. and G. are indicted for having counterfeit money in their possession with intent to pass it. A counterfeit bill is found in F.'s safe and in G.'s pocket. F. is a respectable merchant who has never been charged or suspected before of such a crime. G. is a black-leg who belongs to a gang of criminals. The inference of guilt is very strong in the case of G. and very weak in the case of F.³

IV. A woman being suspected of killing a man by cutting his throat, her house is searched and a razor found in her possession. This raises an inference of guilt.⁴

RULE 109. — The possession by the accused of the fruits of the crime raises a presumption of his guilt.

Illustrations.

I. M. is indicted for the murder of a woman. When arrested, prop-

¹ Burr. Ev. 364.

² *Id.*

³ *Id.*

⁴ *Id.*, R. v. Heath, Wills' Ev. 98.

erty belonging to the woman, such as dress and jewelry, is found in his possession. This raises an inference of his guilt.¹

II. A jewelry store is broken into at night and a number of watches stolen. A month later one of the watches is found in the possession of K., who had worked for the watchmaker and was familiar with the premises. This makes a *prima facie* case against K. for the burglary.²

III. B. is indicted for the murder of C. In the possession of B. after the crime, are found C.'s watch, his purse, keys and papers, also some of his clothing. This raises an inference of guilt.³

In case I. it was said: "Appellant contends that there is not sufficient proof to sustain the verdict; that the whole amount of proof is that the defendant was found in possession of some of the property of the deceased. We view the proof in a different light. He was found in the possession of a large amount of the property of the deceased, and of that property which she had only a few hours before her death; not only in possession of an amount of her property which he could not well have obtained honestly, but he is shown to have made false statements in regard to it. At least if the statements were true, he could easily have proved some of them to be so, which he neither did nor attempted to do. He made statements in regard to the dresses and jewelry having belonged to his wife who he said was dead. Yet on the trial he made no attempt to show he ever had a wife nor any attempt to find the woman who had, according to his story, sent a dress pattern by him for sale. When he sold the diamonds, instead of selling them in their settings, he took them out of the gold setting and sold them separately. This was not the conduct of an innocent man. The possession of property recently stolen or taken from the owner by the perpetration of other felony, such as burglary or robbery, etc., is at least some evidence against the person having possession

¹ State v. Millain, 3 Nev. 409 (1867).

² Knickerbocker v. People, 43 N. Y. 177 (1870); Davis v. People, 1 Park. C. O. 447 (1863).

³ Cicely v. State, 13 S. & M. 220 (1849); Drayne's Case, 5 Leg. Obs. 124; Riem-bauer's Case, 3 Jd. 243.

of the same that he is the felon. If the property is such in character or quantity as would not be likely to come honestly into the hands of the person with whom it may be found, as ladies' dresses, jewelry, etc., in the hands of a single man not engaged in the trade or pawnbroking business, this would greatly strengthen the evidence. If such articles were found in large quantity, beyond the apparent means of the party to acquire honestly, this would still further increase the strength of the evidence. If the party should in addition to all these things tell lies about the property and attempt to dispose of it under false pretenses and representations, this evidence would seem conclusive beyond all reasonable doubt."

In case II. it was said: "It seems almost impossible to escape the conclusion that if possession be evidence of the larceny, it is also evidence of the burglary. Mere possession of another's property proves nothing, until it is shown how it was taken. If the taking was a mere trespass it is impossible to make the possession evidence of anything more or less than the trespass. If a larceny, then it is evidence of the larceny. Here it is entirely clear that the only taking proved was a burglarious taking, a burglarious larceny and no other. The recent possession thereafter of the property thus taken is evidence that the possessor burglariously took it; is evidence of that crime, as no other crime except a burglarious larceny is proved. It proves that crime or it proves nothing. Upon such proof you might as well say that it proved a trespass simply as to say it proved only a larceny. The answer to each is that no such offense is proved. The only offense proved being a burglarious larceny — a burglarious taking — recent possession thereafter proves the prisoner guilty of that offense if it proves anything, as no other offense or taking is proved. Strike out the proof of the burglary in this case, and the prisoner is proved guilty of no crime. Insert it, and possession proves him guilty of that crime, if of any."

Sub-Rule 1. — *In prosecutions for larceny or robbery, the recent possession of the stolen property raises the presumption that the possessor is the thief.*¹

Illustrations.

I. W. is indicted for stealing a pair of shoes from M. From the shoes being found in W.'s possession shortly after they were stolen, the presumption arises that W. was the thief.²

II. A silk dress and a shawl are stolen from a house, and afterwards found in the possession of a man and concealed in his hat. He states that he found them. The presumption is that he stole them.³

III. A number of sheep were stolen from C. on the afternoon of a certain day. The same evening the sheep are found in the possession of M. The presumption is that M. is the thief.⁴

IV. A number of skins are stolen in Kansas. Shortly after they are found in the possession of C. in Missouri. This raises a presumption that C. stole them.⁵

V. On Thursday night B. put his ox in the stable and locked it. In the night the door was broken and the ox stolen. On the following Friday T. was found in possession of the ox and driving it along the road. This raises the presumption that T. stole it.⁶

¹ Price v. Com., 31 Gratt. 146 (1873); State v. Wilkoff, 15 Mo. 174 (1861). And see illustrations post. In a few States it is held that from recent possession alone no presumption of guilt can arise, and that this unaccompanied by other facts will not warrant a conviction. Conkwright v. People, 35 Ill. 204; People v. Chambers, 18 Cal. 382; People v. Ak Kl, 90 Cal. 173; People v. Antonio, 27 Cal. 404; State v. Hodge, 50 N. H. 510 (1889). The possession must likewise be exclusive. State v. Smith, 3 Ired. (L.) 407 (1842); State v. Graves, 73 N. C. 434 (1875).

² State v. Williams, 54 Mo. 170 (1873). And see Pennsylvania v. Myers, Add. 320; State v. Gray, 37 Mo. 463 (1866); State v. Bruin, 34 Mo. 540 (1864); State v. Williams, 9 Ired. (L.) 140; State v. Brewster, 7 Vt. 123 (1835); Hughes v. State, 8 Humph. 73 (1847); State v. Weston, 9 Conn. 527 (1833); Fuller v. State 48 Ala. 273 (1872); Unger v. State, 42 Miss. 642 (1869); Atzroth v. State, 10 Fla. 207 (1860); Wise v. State, 24 Ga. 31 (1858); Mondragon v. State, 33 Tex. 480 (1870); Com. v. Millard, 1 Mass. 6 (1804); Simpson v. State, 4 Humph. 456; Sneathers v. State, 46 Ind. 447; Tuberville v. State, 42 Ind. 490; Jones v. State, 49 Ind. 549; Hall v. State, 8 Ind. 439; Comfort v. People, 54 Ill. 404; People v. Wilson, 30 Mich. 486; State v. Bennett, 3 Brev. 514 (1815); Curtis v. State, 6 Cold. 11 (1868); R. v. Smith, Ry. & M. 395 (1825); State v. Adams, 1 Hayw. (N. C.) 463 (1797). Waters v. People, 104 Ill. 545 (1882); Stokes v. State, 58 Miss. 677 (1881); State v. Brown, 75 Mo. 317 (1882); State v. Butterfield, 75 Mo. 297 (1882); State v. Crank, 75 Mo. 406 (1882); People v. Hurley, 60 Cal. 76 (1882); Tucker v. State, 57 Ga. 508 (1876). From finding part of stolen property in a person's possession the presumption is that he stole the whole of it. Thompson v. People, 4 Neb. 528 (1876); Thompson v. State, 6 Neb. 103 (1877).

³ People v. Preston, 1 Wheel. 41 (1822).

⁴ State v. Merrick, 19 Me. 398 (1841).

⁵ State v. Cassidy, 13 Kas. 559 (1874).

⁶ State v. Turner, 65 N. C. 598 (1871).

VI. A horse is stolen from C. On the same day C. is discovered riding him. This raises a presumption that C. is the thief. This is Lord Hale's illustration.

The reasons on which this presumption is founded are well stated in a learned note to the report of *Cockin's Case*.¹ "As a general proposition where a person is in possession of property it is reasonable to suppose that he is able to give an account of how he came by it, and when the property in question has belonged to another, it is in general not unreasonable to call upon him to do so. If the change of possession has been recent he will not be likely to have forgotten, still less if it be an article of bulk or value. If, then, it be reasonable under such circumstances to call upon the party in possession to account for such possession, it can not be unreasonable to presume against the lawfulness of that possession when he is unwilling to give an account, or is unable to give a probable reason why he can not. Now, there is no reason in general why an honest person should be unwilling, and therefore the law presumes that such person is not honest and that he is the thief. The property must have been taken by some one. He is in possession and might have taken it, and he refuses to give such information upon the matter as an honest man ought."

"There was no error in the instruction," said the court in case I., "that the recent possession of stolen property is presumptive evidence of the guilt of the possessor. Such possession, unless explained, either by direct evidence or attending circumstances or the character and habits of the party with whom the property is found, or by some other mode equally satisfactory as to the innocence of the accused, will be taken as conclusive."

In case III. it was said: "In prosecutions for larceny, where the goods are proved to have been stolen, it is a rule of law applicable to these cases that possession by the accused soon after they were stolen, raises a reasonable pre-

¹ 2 Hale Pleas of the Crown, 339.

² 2 Lewin, 234 (1836).

sumption of his guilt, and unless he can account for that possession consistently with his innocence, will justify his conviction. Evidence of this nature is by no means conclusive and it is stronger or weaker as the possession is more or less recent. Such evidence is sufficient to make out a *prima facie* case on the part of the government, proper to be left to the jury. In the absence of all opposing testimony, *prima facie* evidence in civil cases becomes conclusive and can not be disregarded without calling for correction on the part of the court. When by opposing testimony reasonable doubt is thrown upon a *prima facie* case of guilt it can no longer be said that the party accused is proved guilty beyond a reasonable doubt. The jury are to judge upon the effect of the testimony taken together. It was, in our judgment, too strong to instruct the jury that they must convict the accused unless he had proved to their reasonable satisfaction that he came by the sheep otherwise than by stealing. Proof of good character may sometimes be the only mode by which an innocent man can repel the presumption of guilt arising from the recent possession of stolen goods. As for instance, where the party really guilty, to avoid detection, thrusts unobserved in a crowd the article stolen into the pocket of another man. This may be done, and the innocent party be unconscious of it at the time. And yet good character is not proof of innocence although it may be sufficient to raise a reasonable doubt of guilt. The case finds that the defendant did adduce evidence tending to prove that he bought the sheep of a stranger. It may be easily conceived that this proof may have been strong enough to create in the minds of the jury a reasonable doubt of his guilt; and yet fall short of establishing the fact beyond a reasonable doubt that he did so purchase them. In such a case, the instruction required a conviction, although every one of the jury might entertain reasonable doubts of his guilt."

In case IV., after referring to the cases in which it is held that recent possession of stolen goods alone is not sufficient

to warrant conviction, the court said: "Still the overwhelming weight of authority is with the rule as stated; and as fairly and reasonably interpreted we think it ought to stand. It is not the statement of an absolute and conclusive legal presumption. It is a presumption which is strong or weak according to the nature of the property stolen, the time and place of the larceny, the time within which the possession is shown, the manner of holding and the various other conditions which, appearing in any other case, give occasion for the application of the rule. For it must be remembered that a jury never passes upon this as an abstract question isolated from facts and persons. A larceny must always be proved before there can be any presumption as to who is the thief. Now, when the larceny is proved, the possession may be shown so recently, so almost instantaneously thereafter, as to render it morally certain that the possessor was the thief. To declare otherwise would be to ignore all those facts of human experience and conditions of human action which support the rules of evidence. To instruct a jury that such a recent possession was insufficient to call upon the defendant for an explanation, and unexplained, to warrant a conviction, would insult the intelligence of every juror. As the time between the larceny and the possession is enlarged, the necessity of additional evidence appears, and in some cases the fact of possession may be but a slight circumstance indicative of guilt. There may, of course, be cases where the possession is so long after the larceny that the court ought to instruct the jury that something more than possession must be shown to justify a conviction, but as there may be cases where that possession is so recent as to warrant a verdict of guilty, the court can not, in the absence of a full statement of the facts, say that the District Court erred in refusing to instruct the jury contrary to the ancient rule. Whatever suggestions or qualifications may be appropriate, many cases will depend upon the peculiar facts of the case."

In case V. it was said: "Where a person is found in

possession of goods, which have recently been stolen, there is a presumption of law that he is guilty of the theft, and it is not necessary for the State to show any other suspicious circumstance accompanying such possession. This presumption may be rebutted by the defendant, but if he does not satisfactorily account for such possession by showing that he received the goods honestly, a jury ought to convict him of larceny."

Sub-Rule 2. — *But a reasonable explanation by the accused of his possession overthrows the presumption, and casts the burden on the prosecution (A); provided the explanation is not inconsistent with the identity of the property (B).*

Illustrations.

A.

I. C. is indicted for stealing a piece of wood, the property of H. It is found in the possession of C., five days after it was taken from H. On the trial C. states that he bought it from a neighbor. This is a reasonable explanation, and overthrows the presumption. C. must be acquitted unless the prosecution produce the neighbor and contradict C.¹

In case I., it was said: "In cases of this nature, you should take it as a general principle that where a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that that account is false; but if the account given by the prisoner is unreasonable or improbable on the face of it, the *onus* of proving its truth lies on him. Suppose, for instance, a person were to charge me with stealing this watch, and I were to say, I bought it from a particular tradesman, whom I name, that is *prima facie*, a reasonable account, and I ought not to be convicted of felony, unless it is shown that that account is a false one."

¹ R. v. Crowhurst, 1 C. & K. 370 (1844); R. v. Smith, 3 C. & K. 205 (1845).

B.

I. A beetle head is stolen from the house of W. Fifteen months thereafter it is found in E.'s house and identified by W. as his. E. is called on to explain his possession. If E. says, "I can not remember where I got it," this will be sufficient and he must be acquitted. But if E. says, "I bought this beetle at a sale eight years ago," this contradicts the identity, which remains a question on which E.'s guilt or innocence depends.¹

In case I., Alderson, B., said to the jury: "If the prisoner had said in the first instance. 'Why really I can not tell where or how I got this beetle,' I should have said that that was a reasonable statement, and that he ought not to have been indicted for stealing it; in that case it being assumed that the prisoner does not deny that the article found might once have been the property of the prosecutor. Where, however, the prisoner is shown to have claimed the thing so found in his possession, and sworn by the prosecutor, to be his own property by right of a purchase made eight years ago, and a continued possession up to the present time, I should say that that was not so reasonable an account of his possession as to exempt him from the necessity of accounting for it to the satisfaction of the jury; for if it be true the prosecutor is wrong and the identity of the thing found with that lost is disputed. If the prosecutor should satisfy the jury that the beetle in question was his, then the statement of the prisoner accounting for his possession of it must be false, and he must be presumed to have stolen it, although it was not found in his possession until fifteen months after the loss. The question, therefore, is simply one of identity. Is that beetle the thing which was bought by the prisoner at the sale of his mother's goods eight years ago; or it is another and different beetle which was in the possession of the prosecutor within fifteen months when it was lost? If the latter be the case, the prisoner is guilty."

¹ Queen v. Evans, 2 Cox C. C. 370 (1847).

Sub-Rule 3. — *What is or is not "recent" within Sub-Rule 1 depends upon the cost, bulk, or transferability of the article or property stolen.*¹

That the question whether a possession is recent or not must depend on the nature of the property is clear. In such a case the inquiry naturally arises whether the goods are of a description in common use, or such as might, in the ordinary course of things, come honestly and regularly into the possession of the person found with them, and whether they are of a nature easily passed from hand to hand. "Suppose the Pitt Diamond or the Crown Jewels were stolen, and, after the lapse of one or two years, found in the possession of a person in a comparatively humble station of life, who refused to give any account of where he got them, would there be anything harsh or violent in presuming that he had not come by them honestly? But suppose the goods lost were merely a pair of shoes, or a coat, such as in his station in life it would be natural and proper for the prisoner to wear, and that these were not traced into his possession until after a few months from the time of the theft, the injustice of making so violent a presumption as to deem him the thief becomes obvious at once." "Even if the point were not settled by authority, we should come by a simple process of reasoning to the conclusion that there can be no absolute rule for drawing, from recent possession of stolen property, a presumption of guilt without reference to the nature of the property. The possession of a metallic or paper piece of money of the smallest denomination five days after it was stolen might have less weight as evidence than the possession of the library of Harvard University or Power's Greek Slave, or an elephant, five years after the larceny of such property. It would ordinarily be more probable that the possessor

¹ What is a "recent possession" is a vexed question, and depends in some measure on the nature of the property, as some articles pass from hand to hand more readily than others. *Price v. Com.*, 21 Gratt. 846 (1873).

could prove, by other evidences than his own testimony, how he obtained the possession in the latter case than in the former. It is equally clear, upon authority and upon reason, that the presumption from recent possession of stolen property depends upon the nature of the property."

Illustrations.

I. A couple of sacks are stolen from a farmer. A month afterwards they are found in the possession of another person. This alone can not raise an inference that the latter stole them.¹

II. Two bolts of woolen cloth are stolen from M. Two months after they are found in the possession of P. The presumption is that P. stole them.²

III. An ax and a saw were stolen on March 1st. On June 1st they are found in A.'s possession. This raises no presumption against A.³

IV. A horse disappears from the possession of its owner on December 17, 1849. On June 20, 1850, it is found in the possession of C. This does not raise a presumption that C. is the thief.⁴

V. A shovel is stolen from A. in August, 1841. In March, 1842, it is found in C.'s house. This raises no presumption that C. stole it.⁵

VI. A beetle head is stolen from W. Fifteen months afterwards it is found in the possession of E. This does not raise an inference that E. is the thief.⁶

VII. A five dollar bank-note is stolen from B. and a couple of days after is found in the possession of A. This alone does not raise a presumption that A. is the thief.⁷

VIII. A saddle is stolen from a shop in December, 1852. In May, 1853, it is found in the possession of J. This raises no presumption that J. is the thief.⁸

The reason for this limitation to the rule is well expressed in a learned note to case I. "If the property," says the

¹ Cockins' Case, 2 Lewin, 235 (1836).

² R. v. Partridge, 7 C. & P. 551 (1836).

³ R. v. Adams, 3 C. & P. 600 (1829); R. v. Hewlett, 2 Russ. on Cr. 736, note; R. v. Dewhurst, 2 Stark. Ev. 449, note; R. v. —, 2 C. & P. 459 (1836); State v. Shaw, 4 Jones (L.), 446 (1837); State v. Kinman, 7 Rich. (L.) 497 (1854); Warren v. State, 1 G. Greene, 108 (1848).

⁴ R. v. Cooper, 3 C. & K. 318 (1852).

⁵ R. v. Crutenden, 6 Jur. 267 (1842).

⁶ Queen v. Evans, 2 Cox C. C. 270 (1847).

⁷ R. v. Atkinson, 1 Cr. & Dix, 161 (1825).

⁸ Jones v. State, 26 Miss. 247 (1853).

writer, "has not recently changed hands ; if the time since it passed from the possession of the rightful owner is considerable, then the likelihood of his having forgotten (where he obtained it and thus explain his possession) is increased, and with it the difficulty of giving an account. After an interval of time the means of proof are lessened. People move away from place to place, they die, and little circumstances are confounded together, those of the time with those subsequent or antecedent. The memory of two persons equally honest and intending the truth may not be equally strong; they may differ from each other in the recollection of facts, or enmities may have grown up, and the occasion may be laid hold of to gratify a vindictive feeling. Again, the circumstances in life of the party may be a material point in the question. A man engaged in important daily avocations in which his mind is employed will take less notice of transactions of a different nature; his memory will be less strongly impressed with particulars regarding them; he will, perhaps, never recur to them. Of course, therefore, the impression will be less lasting. It will become overlaid with new and more interesting matter, till the traces of it are lost, and this effect will be likely to happen more or less soon as the object is of less or more value, or of less or greater bulk; and as it may happen to be an article that is more or less frequently brought under the party's view. Judges, therefore, hold, and most reasonably hold, that a person is not to be called upon to give an account at a distant period after the theft. The question, however, of distance of time or recent possession must be at all times one of fact under the circumstances, and a jury under the judge's direction must ultimately decide." And in case I. Coleridge, J., said to the jury: "If I was now to lose my watch and in a few minutes it was to be found on the person of one of you, it would afford the strongest ground for presuming that you had stolen it; but, if a month hence it were to be found in your possession, the presumption of your having stolen it

would be greatly weakened, because stolen property usually passes through many hands."

In case II. it was urged that the possession was not sufficiently recent to raise the presumption. But Patteson, J., said: "I think the length of time is to be considered with reference to the nature of the articles which are stolen. If they are such as pass from hand to hand readily, two months would be a long time; but here that is not so."

In case IV. Maule, J., said he thought there was no case to go to the jury—the possession was not sufficiently recent. Where a man is found in possession of a horse six or seven months after it is lost, and there is no other evidence against him but that possession, he ought not to be called to account for it.

In case V., Gurney, B., said to the jury: "I have frequently had occasion to tell you gentlemen that when property proved to be stolen is found shortly after the theft in the possession of a party, that person is to be presumed to be the thief, unless he can explain satisfactorily how he came by it. But in this case I do not think the possession of this shovel sufficiently recent to raise that presumption against the prisoner. A period of six months has elapsed since the property was lost, in which time it might have passed through several hands."

In case VI. it was said: "In cases where property of such insignificant value as that laid in this indictment is shown to have been stolen so long as fifteen months before it is discovered in the possession of a stranger, that person ought not to be called on to answer for that possession on a charge of felony, for it might reasonably be inferred that he had come honestly by it, in that long interval reference being always had to the character and value of the thing itself."

In case VII. it was said: "The finding of stolen property on the prisoner, recently after the taking, is evidence of the larceny having been committed by him, as it is of

burglary, if the goods had been burglariously taken, and sufficient to call on him to account for his possession, yet in a case of a bank-note such finding, if evidence at all, is too slight to found a verdict upon, for the note passes easily and quickly from hand to hand, without examination, and people are not to be expected to mark each note, or to be able to show from whom it has been received. If, indeed, the note were of a large amount, it might be otherwise."

In case VIII., it was said: "The evidence shows that the goods were not found in the possession of the accused until the lapse of five or six months after the taking, and the question here presented is whether such possession, found after such lapse of time, of itself raises a presumption in law of a felonious taking by the accused. No definite length of time after loss of goods and before possession shown in the accused, seems to be settled as raising a presumption of guilt. When the goods are bulky or inconvenient of transmission or unlikely to be transferred, it seems a greater lapse of time is allowed to raise the presumption than when they are light and easily passed from hand to hand, and likely to be so passed, because in the one case the goods may not have passed through many hands and the proof to justify the possession may, therefore, be more simple and easy; but in the latter case the goods may very probably have come to the accused through many persons, and their transit, from the smallness of their nature and value, be much more difficult to be proved. Yet all the cases hold that the possession must be recent after the loss, in order to impute guilt; and the presumption is founded on the manifest reason that where goods are taken from one person and are quickly thereafter found in the possession of another, there is a strong probability that they were taken by the latter. This probability is stronger or weaker in proportion to the period intervening between the taking and finding; or it may be entirely removed by the lapse of such time as to render it not improbable that

the goods may have been taken by another, and passed to the accused, and thus wholly destroy the presumption. In prosecutions for larceny of chattels, like that in this case, it has been well held that after the lapse of such a period of time as in this case, the mere fact that the chattels were found in possession of the accused, created no presumption of criminality, and that such possession, without other evidence of any kind to establish the charge, is not even sufficient to put the party on his defense. We recognize the soundness of this rule."

RULE 110. — From proof of a sudden change having taken place in the life and circumstances of the accused subsequent to the crime, a presumption of his guilt may arise.

Illustrations.

I. A, a rich man, is found murdered and robbed. B., a poor relative, immediately afterwards commences to live and spend money like a rich man. This may raise an inference of B.'s guilt.¹

II. An inn-keeper was in such poor circumstances that the owner of the inn would not trust him for a quarter's rent, nor the brewer for a barrel of beer. One night a guest, carrying with him a large quantity of money, is murdered at the inn. Immediately thereafter the inn-keeper is observed to be "flush." His family commence to dress well, and he purchases a malt-house. This raises an inference that the inn-keeper was the murderer.²

III. A trunk containing twenty-three bank bills of the denomination of \$100 is broken into and the money stolen. M. is indicted for the crime. The fact that before the time of the robbery M. was in poor circumstances and that afterwards he was possessed of several bank bills of a large denomination is relevant, and raises an inference against M., although the bills are not identified as the bills stolen from the trunk.³

IV. M. is indicted for a burglary and robbery. It appears that before the crime M. had no money and few clothes; that a short time afterwards he bought two suits, and also some furniture, and had money in his pocket. This raises an inference against M.⁴

¹ Best Ev., sec. 459.

² Drayne's Case, 5 Leg. Obs. 123 (1634).

³ Com. v. Montgomery, 11 Metc. 534 (1846).

⁴ Moye v. State, 66 Ga. 740 (1881).

In case III. it was said: "The further objection is that the judge instructed the jury that the possession by the defendant of two one hundred dollar bills, though not identified as a part of the property stolen, was still a circumstance proper for their consideration as tending to show large sums of money in the hands of the defendant subsequently to the larceny. Such evidence may be competent. Its effect may be very slight, and, in many cases, furnish not the least ground for charging a party. The possession of a large sum of money, with strong accompanying circumstances of guilt of an independent character, accompanied with evidence of entire destitution of money before the time of the larceny, may properly be submitted to the jury."

RULE 111. — The fact that the accused has given false, inconsistent, or contradictory accounts of the circumstances of the crime or of his relation to the act, raises the presumption that he is the criminal.

Illustrations.

I. D. was suspected of having poisoned E. It appeared that he had stated to F. that E. had died of a cold induced by wet feet; to S. that he had ruptured a blood vessel, and to H. and J. that he had died from the effects of a venereal complaint. This raises an inference that D. was guilty.¹

II. A person is murdered in the night in a house in which C. was at the time. It appears that C. on being questioned stated at one time that the murder was committed by five robbers whom she saw break in. At another time she stated that she was asleep all night and heard no one in the house. This raised a presumption of her guilt.²

III. A. is found in possession of a stolen horse. He states that he had purchased it at D. But there was not time enough for A. to have bought the horse at D. and to have reached the place where he was arrested. This raises a presumption of A.'s guilt.³

¹ R. v. Donellan, Phil. Tr. 126.

² State v. Cicely, 13 S. & M. 206.

³ State v. Adams, 1 Hayw. (N. C.) 464.

IV. R. is indicted for stealing from dwelling-houses. On being interrogated she stated at one time that she is a widow, at another that she has a husband; to one she says that the property is hers, having purchased it in an adjoining city; to another she says that it was brought to her house by a man in embarrassed circumstances to conceal it from his creditors. This raises a presumption of R.'s guilt.¹

V. A.'s house is robbed and burned. Bank bills of the same denomination as were taken are found to have been passed by G. to different persons after the robbery. To one he stated that he had received them from the sale of a crop of cotton; to another that he had received them for building a house; to another by the sale of six negroes. The judge instructed the jury on the trial of G. for the robbery that giving inconsistent and contradictory accounts in relation to the manner in which he obtained the bills was evidence to prove that he did not come honestly by them. *Held*, correct.²

In case V. it was said: "It is insisted that this instruction was erroneous for that in the first place such inconsistent and contradictory declarations do not in law prove more than that some of them are false, and secondly, that if they amount to proof of a dishonest acquisition they do not, as the judge intimates, furnish evidence that the prisoner stole the bills which the prosecutor lost or committed the arson of which he was accused. To form a correct judgment of the validity of the objections, it is indispensable that we should first ascertain the meaning of the instruction to which they apply. Are we to understand the judge as having declared that the contradictory statements did prove a dishonest acquisition; or only that they were evidence having a tendency to prove it, relevant to that purpose and fit to be weighed by the triers with a view to the determination of that fact? We can not doubt but that the former is not, and that the latter is the sense of the instruction which he intended to give, and which the

¹ *Mary Riley's Case*, 1 City Hall Rec. 23 (1816). And see *Com. v. Goodwin*, 14 Gray, 55 (1859). The admission in evidence of the prisoner's false statements made at the time of his arrest warranting an inference of guilt, does not entitle him to show that he had previously, on other occasions, given a different and true account of the same facts. *Id.*

² *State v. Gillis*, 4 Dev. (L.) 607 (1834).

jury understand his words to convey. * * * Upon an anxious and deliberate consideration of all that has been urged in argument, and of all which our own reflections can suggest, we are bound to declare that we see no error. Contradictory declarations in respect to a fact do not, indeed, absolutely and directly prove more than that all of them can not consist with the fact. All may, some of them must, be untrue. If made by an individual in regard to a matter of which he has positive knowledge, he is guilty of falsehood. But the fact of falsehood once established, it becomes in many cases an important piece of evidence to ascertain other facts — the causes which induced and the ends to be promoted by a resort to falsehood. There is direct testimony of an arson committed under circumstances clearly indicating that a robbery was at the same time perpetrated by the incendiary. An individual who before the commission of these crimes was destitute of money and of property immediately thereafter quits the neighborhood, travels to a considerable distance to and fro without an assignable motive, is in possession of four bank bills constituting a large sum of money, corresponding in amount and in the character and respective denominations of the bills with those stolen from the prosecutor, and busies himself in converting these into bills of another kind, and of less value, for which he gives a premium. No mind capable of drawing a conclusion from connecting facts can hesitate to acknowledge that such testimony strongly attaches to this individual, the charge of the theft and arson. But in addition to these facts there is another circumstance. In the course of his wanderings he gave many relations to different persons at different places, with respect to the manner in which this money, so strangely in his possession and so strangely used, has been acquired by him, and these relations are wholly inconsistent with each other. The connection between such conduct and the motives for it, the consciousness which it indicates and the interests which

are intended to be served by it, are unquestionably matters well meriting the consideration of those whose grave duty it is by all the means in their power, to ascertain the truth of the imputed charge. Falsehood, diversified in its forms, but always repeated on this point, clearly tends to show a consciousness of dishonest acquisition and a solicitude to embarrass inquiry and to prevent detection. That it proves dishonest acquisition is not an inference of law, nor was it the instruction of the judge; but that it is relevant to that fact, and is evidence for that purpose, fit to be considered and weighed by the jury, seems well warranted by reason, observation and experience. Whether by itself or in connection with the other matters testified, it produces a conviction so settled and undoubting as to induce the jury to infer that fact as once proved to exist, must be left, as it has been left, to their integrity, their intelligence and their acquaintance with the ordinary concerns of human life."

RULE 112. — The fact that the accused had attempted to stifle or thwart the investigation of the crime raises the presumption that he is the criminal.

Illustrations.

I. S. is suspected of having poisoned T. It appears that S. has tried in every way to prevent the body of T. from being exhumed and examined. This raises an inference of S.'s guilt.¹

II. S. disappeared while living in R.'s house. R. being suspected of murdering him, and it being proposed to take up the basement floor, objected strongly, urging that if the floor was taken up the house would fall down. The officers of the law persisted and the body of S. was found underneath the floor. A strong inference of R.'s guilt arose.²

III. C. being suspected of the murder of D., it is sought to compare her feet with certain foot-prints. C. resists, and has to be compelled by force to put her feet in the tracks. This raises a presumption of guilt in C.³

¹ *R. v. Stansfield*, 11 How. St. Tr. 1402.

² *State v. Robinson*, Burr. Ev. 462.

³ *State v. Cicely*, 13 S. & M. 205.

RULE 113. — Fear, exhibited by the accused, raises a presumption of guilt (A). But no presumption can arise where the fear may be on account of another act or crime (B).

Illustrations.

A.

I. T. comes into a town with a horse and immediately employs an auctioneer to sell it. While the sale is going on T. is observed to look excited and apprehensive, and on receiving the purchase-money leaves the place at once, and on subsequently meeting the auctioneer endeavors to avoid him. The conduct of T. raises a presumption of his guilt.¹

II. A. being accused of the murder of B. shows a great repugnance to looking at the dead body of B. This is relevant.²

III. S. disappeared while living with R., and suspicion was cast upon R. because he refused to sleep in the house thereafter, giving as a ground that one of his children had died there suddenly. Subsequently the body of S. was found buried under the basement floor of the house. R. was convicted.³

IV. A. is indicted for poisoning his wife. The fact that A. after the poison had been administered to his wife called at a neighbor's house and stopped there some time, during which time he was unusually silent and serious, is relevant.⁴

"These circumstances," said the court in case I., "strongly manifest a consciousness on the part of the prisoner that some flagrant wrong had been committed by him, and an apprehension that it was known; which wrong probably related to his possession and disposition of the horse. We are told by an early and most venerable authority that the wicked fly when no one pursues; and we are told elsewhere that conscience makes men cowards. If the *corpus delicti* had been proved — that is that the horse had been stolen — much less than the circum-

¹ *Tyner v. State*, 5 Humph. 383 (1844).

² *R. v. Stewart*, 19 How. St. Tr. 156; *Mrs. Spooner's Case*, 2 Chand. Am. Cr. Tr. 13; *R. v. Ogilvie*, 19 How. St. Tr. 1234.

³ *State v. Robinson*, Burr. Ev. 462.

⁴ *Johnson v. State*, 17 Ala. 622 (1850).

stances proved would have established that the prisoner was the thief."

In case IV., it was said: "We can not say that facts such as silence which indicated unusual seriousness at such a moment are inadmissible as evidence tending in some degree to show the prisoner's guilty knowledge of the condition of his wife, or to show his crime itself. Doubtless, such a circumstance by itself should weigh but little, and it should be received with great caution, but we can not say that it was wholly inadmissible. Roscoe, in speaking of the caution with which certain evidence should be received, says: 'Not unfrequently a presumption is founded from circumstances which would not have existed, as a ground of crimination, but for the accusation itself; such as the conduct, demeanor and expressions of a suspected person when scrutinized by those who suspect him'.¹ If the conduct, demeanor and expression of the accused subsequent to the crime may be proved as evidence of conscious guilt, although to be received cautiously, it is not obvious why the same indications at or about the time of the crime may not be proved by the same purpose. A flight is universally admitted as evidence of the guilt of the accused, though not conclusive. If we take a flight as evidence of fear, and fear as evidence of a known cause of dread or apprehension, we arrive thus at the inference of crime. But it is sufficient, perhaps, for all practical purposes to regard flight as immediate evidence of crime, because it betrays conscious guilt. In this instance then we take the flight, a thing in itself blameless and innocent as evidence of conscious guilt, a necessary consequence of the crime itself, and the conscious guilt of which the flight was evidence is proof, in its turn, of the crime. In this instance, therefore, it is certain that the law admits evidence of the party's conduct merely to prove his conscious guilt, which is proof of crime. Now this conscious guilt is altogether internal, but the law allows

¹ Roscoe Crim. Ev. 15.

that proof of it which consists of outward signs. Is a flight the only outward evidence of conscious guilt? So far from it, any indications of it arising from the conduct, demeanor, or expressions of the party are legal evidence against him. The law can never limit the number or kind of such indications. In the present case it may be presumed, because this is consistent with the facts stated, that the poison was prepared by or before nine o'clock a. m., on Sunday, and that preparations were made for it to be given to the deceased; and it is consistent to suppose that this was expected to be done, and was done immediately. About nine o'clock a. m., on Sunday the prisoner appeared at the house of W., a mile and a half from his own residence, and remained there until about an hour after sunset. If guilty he had already prepared for the destruction of his victim, the poison it is probable was already producing its effects, and he was aware of the fact. That was peculiarly the occasion for conscious guilt to reveal some evidence of the crime. If he were unusually serious or brooding in his mind or impressed with fear, these were admissible evidences of the crime, upon the same principle that conscious guilt may be proved by a flight."

B.

I. The house of A., a bachelor, is searched for a political prisoner thought to be hidden there. A. makes no objection to the search until they come to his bed-room. A person being there discovered in A.'s bed, A. endeavors by all devices to prevent that person's identity from being discovered. But A.'s fear arises not on account of the person being the prisoner, but because the party in his bed is a woman of rank and reputation with whom he is, unknown to everybody, carrying on a *liaison*.¹

II. An habitual thief is taken into custody for a robbery committed on A. The thief, imagining that an attempt to rob B. has been discovered, displays great confusion and fear. Here conduct raising an inference of guilt is caused by the recollection of another crime, for he has never even seen A.²

¹ In this case, which is often cited, A.'s presence of mind saved himself and her by uncovering enough of her person to the officer to indicate the sex without betraying the individual. Best Ev., sec. 463.

² Best Ev., sec. 466

RULE 114.—The flight of the accused (A) or his attempts to escape (B) raise a presumption of his guilt; unless it appear that the act was for another reason (C).

Illustrations.

A.

I. A. and B. are suspected of the murder of C., committed in Kentucky, where all of the parties lived. It is shown that though immediately after the crime was committed a search was instituted for A. and B., they could not be found, and were afterwards arrested many miles distant in a neighboring State. This raises a presumption of their guilt.¹

II. A. is out on bail, pending his trial for a crime. When the case is called it is found that A. has left the State and forfeited his bond. He is subsequently brought back. His flight raises a presumption of his guilt.²

“It was proven by the Commonwealth,” it was said in case I., “that the appellants, although quickly pursued by soldiers and others, could not be found upon search made for them at their homes, and were subsequently arrested in or near the city of Cincinnati. These circumstances, unexplained, could not have failed to lend to the other facts an additional presumption of guilt.”

B.

I. M. was on trial for murder. While the jury were considering their verdict M. made his escape from the court-room. The jury failed to agree. M. was captured and tried the second time. *Held*, that the former attempt to escape raised an inference of his guilt.³

¹ *Plummer v. Com.* 1 Bush, 76 (1866). And, see, *People v. Ah Choy*, 1 Idaho, 317 (1870); *People v. Stanley*, 47 Cal. 117 (1873); *Smith v. State*, 58 Miss. 873 (1881); *Mathews v. State*, 9 Tex. (App.) 138 (1880); *Arnold v. State*, 9 Tex. (App.) 436 (1880); *Aiken v. State*, 10 Tex. (App.) 610 (1881); *Blake v. State*, 3 Tex. (App.) 581 (1877); *Gose v. State*, 6 Tex. (App.) 121 (1879); *People v. Lock Wing*, 61 Cal. 381 (1882); *Sylvester v. State*, 71 Ala. 25 (1881).

² *Porter v. State*, 2 Ind. 435 (1850).

³ *Murrell v. State*, 46 Ala. 89 (1871); *Foxley's Case*, 5 Coke, 109b; 43 Eliz.; *People v. Wong Ah Ngow*, 54 Cal. 151 (1890). In Iowa it is held that the presumption of guilt from an attempt to escape is very slight. “Anciently,” says the court, “the common law attached undue significance to an attempt to evade arrest, or to escape from it. In our time, however, the law will not allow a party to be convicted even on his own confession, if it be uncorroborated.” *State v. Arthur*, 23 Iowa, 432 (1867). When a culprit recklessly destroys life in order to escape the consequences of another crime, the evidence of guilt of that crime is thereby strengthened. *Revel v. State*, 26 Ga. 275 (1858).

II. A., on being apprehended for a crime, attempts to escape. This raises a presumption of A.'s guilt.¹

III. D., while in custody for a crime, attempts to bribe one of his guards. This raises an inference of D.'s guilt.²

IV. A. being accused of a crime jointly with B., advises and assists B. to escape. This raises an inference of A.'s guilt.³

In case I. it was said: "The escape was an attempt to flee, and it had reference to the charge in the case. Flight in a criminal prosecution is one of the most common grounds for a presumption of guilt. And when the flight is connected with the offense charged, and for which the accused is on trial, it is an act that indicates fear, and this fear points to guilt. Acts speak as well as words, and they are to be interpreted by the common experience of mankind. And a flight is universally admitted as evidence of the guilt of the accused, though it is not conclusive." But the fact that the prisoner had an opportunity to escape, but did not avail himself of it, is not relevant. "It is supposed," said the court, "that the admissibility of such proof follows from the rule which turns an attempt to escape against the prisoner. A strong declaration of Hume in his treatise on the trial of Crimes, that such a fact should be received as conclusive against any cases sustained by circumstantial evidence merely was cited. But the difference between an attempt to escape and refusal to escape, whatever degree of moral conviction the latter might carry to the mind of the writer, is quite obvious when they are offered as legal evidence. The attempt implies guilt and operates against the party like a confession. The refusal is an act and confession in his own favor. Once received it and the criminal courts will be loaded with such evidence. It is almost as easily manufactured as a declaration of inno-

¹ *Dean v. Com.* 4 Gratt. 541 (1847); *Fanning v. State*, 14 Mo. 386 (1851); *State v. Mallon*, 75 Mo. 353 (1892); *People v. Strong*, 46 Cal. 302 (1873); *State v. Williams*, 54 Mo. 170 (1873); *State v. Phillips*, 24 Mo. 486 (1857).

² *Dean v. Com.* 4 Gratt. 541 (1847); *Whaley v. State*, 11 Ga. 127 (1852.)

³ *People v. Rathbun*, 21 Wend. 509 (1839); *People v. Pitcher*, 15 Mich. 397 (1867).

cence. The prisoner and his friends may introduce a third person to give the advice and hear the refusal who may be a witness with perfect integrity. A dupe himself, he may testify to the fact without being guilty of perjury."

C.

I. A. and B., after the commission of a murder which they are suspected of being guilty of, fly from their homes to a distant State. This raises a presumption of guilt. The fact that A. and B. fled because of a fear of violence at the hands of their pursuers overthrows this presumption.¹

II. A. is confined in jail on a charge of murder. A. attempts to escape. This raises no presumption of guilt of the murder, if A. sought to get away from the jail because of his cruel treatment by his guards.²

III. F. who is suspected of a crime is found to have subsequently changed his residence. F. is a peddler who is accustomed to go from place to place. No presumption of guilt can arise from this circumstance alone.³

"But there was evidence," it was said in case I. "before the jury tending to explain the concealment and flight of appellants upon the ground that they were occasioned by an apprehension of violence from soldiers or otherwise; and this, in our opinion, was competent evidence which the jury had a right to regard as conducing to rebut the presumption of guilt arising from the concealment or flight of the appellants."

RULE 115. — The destruction (A), concealment (B), or fabrication (C) of evidence by the accused raises a presumption of his guilt—omnia præsumuntur contra spoliatores.

On the trial of Lord Melville,⁴ the solicitor-general (Sir Samuel Romilly), in addressing the House of Lords and

¹ *People v. Rathbun*, 31 Wend. 519 (1839).

² *Plummer v. Com.*, 1 Bush, 76 (1866); *Golden v. State*, 25 Ga. 527 (1863); *Arnold v. State*, 9 Tex. (App.) 436 (1890).

³ *State v. Mallon*, 75 Mo. 356 (1882).

⁴ *Best Ev.*, sec. 461.

⁵ 29 How. St. Tr. 1194 (1806).

speaking of the act of the prisoner in destroying certain vouchers, said: "I should think it could hardly be necessary to your lordships collectively; I am sure it can not be to many of you individually, to state what inferences courts of justice always draw from the destruction of evidence. Most of the cases that have occurred of that kind, at least if those that I have known are civil cases; but I know of no distinction in this respect between civil and criminal cases. The presumption in one case is, as I conceive, as strong as in the other. In civil cases, a party who destroys evidence of a transaction is always charged to the full extent that it was possible that that transaction could have gone. I will state to your lordships a very few cases which have occurred on questions of this kind (after citing *Armory v. Delamare*, *Dalton v. Coatsworth* and *White v. Lincoln*¹ he proceeded): "I have, however, hitherto only stated to your lordships civil cases, but I am sure that no case occurs of any person convicted of an offense upon circumstantial evidence, in which the court does not act upon presumptions exactly of the same kind. I would suppose that a man were indicted for the murder of another, and that there was no evidence against him, but that which is called circumstantial evidence; that is evidence of conduct or of circumstances which can not be accounted for upon any hypothesis, but that of the party being guilty. I will suppose a case of that kind, and then I will ask your lordships, if evidence were to be produced that the prisoner had destroyed the clothes which he wore upon the day on which the man was murdered, whether a jury would not be directed to presume or whether a jury would not presume that the clothes so destroyed had been stained with the blood of the man that was murdered, and that they had been destroyed only for the purpose of suppressing that evidence? If a jury would not be expressly directed to presume guilt from this, I would ask whether the party's having destroyed the clothes he wore upon the

¹ See *Ante*, ch. VII, p. 140.

day on which the man was murdered would not be considered as most material evidence in such a case? And whether it could be evidence in any way, but that in which I have stated that it must be presumed that no innocent man would have destroyed that evidence, which would have contributed to his acquittal if innocent, and could contribute to his conviction only if he were guilty."

Illustrations.

A.

I. A. is accused of the murder of B. by poison. The fact that A. had the body of B. interred with great haste is relevant on the question of A.'s guilt.¹

II. D., who resided with E., is accused of poisoning him. The death of E. being very sudden, H., his guardian, wrote to D. saying that as he suspected that E. might have been poisoned, he wanted his body opened for the purpose of investigating that fact. D. replied, assenting, when H. wrote a second letter as to the investigation of the body by physicians, but saying nothing about poison. When the doctors came D. showed them the *second* letter but said nothing about the first, and on being asked the purpose of the examination told them that it was only for the satisfaction of the family. The physicians, therefore, suspecting nothing, omitted to search for poison, and D. had the body immediately interred. These facts were held to raise an inference of D.'s guilt.²

III. A person before being arrested for the murder of another attempts to remove all trace of the blood and to destroy all the instruments of the crime. This raises a presumption of guilt.³

IV. A. being accused of a crime attempts to spirit away a witness. This is relevant.⁴

B.

I. S. is indicted for the forgery of a bank-note. On his being arrested a forged bank-note is found concealed in the cuff of his coat. This raises an inference of guilt.⁵

II. A., who was a soldier, was accused of the murder of C. In order to identify a soldier who had sold a watch belonging to C. to B. the com-

¹ *R. v. Donnell*, Will's Circ. Ev. 188.

² *R. v. Donnell*, Phill. Tr. 181.

³ *Burr*, Ev. 412.

⁴ *Martin v. State*, 28 Ala. 71 (1856).

⁵ *Stewart's Case*, 2 City Hall Rec. 187 (1817); *People v. Gardner*, 2 Wheeler, 28 (1832).

pany was drawn up in line so that B. could see them. While B. was passing along the line to inspect the soldiers, A. attempted to conceal himself behind the door of a house which stood near. This circumstance is relevant in raising a presumption that A. was guilty.¹

III. L. was indicted for the murder of his wife. It appeared that L. had concealed her death from every one for several hours after it took place. This is relevant.²

IV. A. on being arrested for robbery takes a pocket-book out of his pocket and slips it under his coat into the hands of his wife who stands by him, then turns to the officers and declares he has no money. This raises a presumption of A.'s guilt.³

In case III. it was said: "The prisoner concealed the killing for several hours. He has never admitted the killing by himself and claimed that it was an accident or for any cause excusable; at least there is no evidence of any such admission. Concealment, it is well settled, is evidence of malice—of a premeditated design to commit the deed. If he had not intentionally committed the deed, some human emotion would have induced him to betray his sorrow or his consciousness of his own overwhelming disaster."

In case IV. the trial court in reference to that transaction had instructed the jury that the suppression, destruction or concealment of evidence against the accused was a circumstance from which they should draw the strongest inference of guilt, because if he was innocent he would have no interest in concealing or destroying such testimony. The Supreme Court thought the epithet "strongest" too strong, but would not reverse the case on this ground.

C.

I. C. was absent from his house for over an hour, and on returning said to his servant: "If any inquiries are made, say that I was not out more than ten minutes." C. being indicted for a murder committed during his absence from home, this request of his raises a presumption of his guilt.⁴

¹ *Flanagan v. State*, 25 Ark. 93 (1869).

² *Lanergan v. People*, 6 Park. C. C. 225 (1863).

³ *Miller v. People*, 39 Ill. 466 (1866).

⁴ *R. v. Rush*, Burr. Ev. 436.

II. A. is accused of shooting B. with a pistol. A pistol is found beside B. in such a position that it would appear that it is a case of suicide. But it is proved that it is A.'s pistol, and that A. placed it there. This raises a presumption of A.'s guilt.¹

III. R., a postmaster, is charged with the embezzlement of a registered letter. In his books, entries concerning the letter are found to have been erased and added to. This raises a presumption of R.'s guilt.²

IV. A. person charged with murder is proved to have sent a letter to the officers of the law throwing suspicion on another. This is relevant.³

In case III. it was said: "The falsification of records, either by interlineations or erasures, with reference to a matter in which the party making such falsification is suspected or charged, or liable to the suspected or charged with neglect or wrong doing, is strong presumptive evidence of guilt."

"The general rule is," said the court, in case IV., "that whatever falsehood a person charged with crime, concocts to avert suspicion from himself is admissible evidence against him. And on the same principle whatever falsehood a person thus situated puts forth to charge his own offense upon another who is innocent must be competent evidence against himself.

In a leading case, Chief Justice Shaw, said: "To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations and to cast suspicion without just cause on other persons; all or any of which tend somewhat to prove consciousness of guilt, and when proved to exert an influence against the accused."

* * * * *

¹ R. v. Green, 7 How. St. Tr. 159 ; R. v. Norkutt, 14 Id. 1824.

² U. S. v. Randall, Deady, 543 (1869). In State v. Knapp, 45 N. H. 148 (1863), on the trial of an indictment for rape, the jury had been taken to view the premises where the crime was alleged to have been committed. It appeared that just previous to this a change had been made in the condition of the place—some boards which had fallen off a fence were replaced by a person acting in behalf of the prosecution. The court held that this cast the burden on the State of satisfying the appellate court that the prisoner could not have been injured by the change; and that it was not enough to render it merely more probable that no injury had been done to him.

Gardner v. People, 6 Park. C. C. 205 (1868).

“ But this consideration is not to be pressed too urgently, because an innocent man when placed by circumstances in a condition of suspicion and danger may resort to deception in the hope of avoiding the force of such proofs. Such was the case often mentioned in the books of a man convicted of murder of his niece who had suddenly disappeared under circumstances which created a strong suspicion that she was murdered. He attempted to impose on the court by presenting another girl as the niece. The deception was discovered, and naturally operated against him, though the actual appearance of the niece alive afterwards, proved conclusively that he was not guilty of the murder.¹

Robbery may take place by putting in fear as well as by force, or rather as has been said, fear may take the place of force. But actual fear need neither be alleged nor proved. “ Provided,” say the old writers,² “ the property be taken with such circumstances of violence or terror, or threatening by word or gesture as would in common experience induce a man to part with it from an apprehension of personal danger, the law in *odium spoliatoris* will presume fear where there appears to be a reasonable ground for it.” In *Norden's Case*,³ this presumption was carried as far as this. A person having been told that one of the stage coaches coming to the town where he lived had been frequently robbed by a single highwayman, resolved to capture him. In pursuance of this resolve he put a small sum of money and a pistol in his pocket and followed the coach in a chaise. The highwayman duly appeared, and after relieving the passengers in the coach of their valuables came to him, and presenting a weapon demanded his money. The amateur detective handed over his purse, and then jumping from the chaise, with the aid of the passengers in the coach, captured the highwayman. The latter was held guilty of robbing the chaise passenger.

¹ *Com. v. Webster*, 5 Cush. 317, Shaw, C. J.

² See *East's Pleas of the Crown*, 711.

³ *Fost.* 129.

RULE 116. — Silence on the part of the accused when charges are made against him in his presence and hearing, raises a presumption of guilt (A) unless the charges are made in the course of a judicial interrogation (B). But the failure of the accused to produce on his trial evidence in his favor and within his power raises a presumption of guilt (C).

Illustrations.

A.

I. A. is accused of administering a poison to his wife with the intention of killing her. A witness testifies that the wife had declared that A. had attempted to poison her, in his presence, and that A. was standing near by, but made no response. This is relevant.¹

II. One S. being murdered, H. says to R., "Everybody suspects you. I suspect you." R. remains silent. On the trial of R. for the murder of S. this is relevant.²

III. M. was murdered by stabbing. Before he died, being in the presence of D., and in his hearing, M. says that he won \$55 from D., the night before, and that D. had murdered him to get back the money. This is relevant and raises an inference against D. on his trial for the murder of M.³

IV. S. is indicted for the murder of T. Certain observations were made by his wife in the presence of others on the subject of the crime, to which S. made no direct reply. These statements are relevant against S.⁴

V. Several times while confined in jail, A. accused B. of the murder of E. to which B. made no response. This is relevant.⁵

VI. M. is accused of a burglary and robbery. It appears that after the crime was committed, M. and his brother were at a candy pulling together, when the brother, in M.'s presence and hearing, remarked that he had \$150 in his possession belonging to M. M. made no response. This is relevant as an admission of M. that it was true.⁶

¹ *Com. v. Galavan*, 9 Allen, 271 (1864). The conduct, demeanor, and expression of the accused at or about the time of the commission of the crime with which he is charged, are competent evidence against him. *Blount v. State*, 49 Ala. 381 (1878).

² *State v. Reed*, 62 Me. 130 (1874).

³ *Donnelly v. State*, 26 N. J. (L.) 613 (1887); *contra*, *State v. Edwards*, 13 S. C. 30 (1879).

⁴ *R. v. Smithies*, 5 C. & P. 332 (1832).

⁵ *Etinger v. Com.*, 26 Pa. St. 345 (1881); *State v. Crockett*, 62 N. C. 600 (1880).

⁶ *Moye v. State*, 66 Ga. 740 (1881).

In case I. it was said: "The statements of the defendant's wife while in a room connected by an open door with the narrow entry in which the defendant was standing, related to acts done by the defendant or in his presence. They were made in the defendant's own house, in the absence of any officer of the law or anything which might create constraint or apprehension, and under such circumstances that he might well have heard, and if he did must have understood them, and known whether they were true or false, and would have been likely, according to common experience, to reply to them and contradict them if untrue. They are, therefore, admissible in evidence against him within the rule laid down."

In case II. the court said: "No doubt as to the fact that he was told he was suspected is suggested. His silence is not denied. A suspicion of crime conveyed to the prisoner is so nearly similar to a charge of having committed the crime that the jury would not be misled (by speaking of the words as a "charge" of the crime) especially when their attention is directed to the testimony upon which the remark is predicated; and whether it was a suspicion or charge the same law would be applicable. The probative force of the fact would be the same in either case; or if different, it would differ in degree only. The law given was correct. * * * It is introduced by the remark of the presiding judge that, it is not merely what the prisoner says or does, but what he omits to do or say that may become facts evidentiary of guilt. Then after alluding to the facts as shown by the testimony, he says further, 'What is the law? A statement is made either to a man or within his hearing that he was concerned in the commission of a crime to which he makes no reply; the natural inference is that the imputation is well founded or he would have repelled it.' This is a quotation from Best, on Presumptions, affirmed in *State v. Cleaves*,¹ and its justice and pro-

priety are there so fully illustrated that we deem it unnecessary to add anything to what is there said."

In case III. it was said: "When a matter is stated in the hearing of one which injuriously affects his rights and he understands it and assents to it wholly or in part by a reply, both are admissible in evidence, the answer because it is the act of the party who is presumed to have acted under the force of truth, and the statement as giving point and meaning to the action. So, also, silence unless it be accounted for * * * may be taken as a tacit admission of the fact stated, because a person knowing the truth or falsity of a statement affecting his rights made by another in his presence, under circumstances calling for a reply, will naturally deny it, if he be at liberty so to do, if he does not intend to admit it. Whatever is said to a prisoner on the subject-matter of the charge, to which he made no direct reply, is receivable as evidence of an implied acquiescence on his part."

In case IV., although the wife was not admissible as a witness, the court thought that this circumstance did not vary the general rule stated in the last sentence.

In case V. it was said: "The circumstances under which the accusation was made were so well calculated to elicit a reply, that we are not prepared to say that the silence of the prisoner was not a circumstance, though very slight, for the consideration of the jury. Silence under certain circumstances, may amount to a tacit admission of guilt."

"Where an individual is charged with an offense or declarations are made in his presence or hearing touching or affecting his guilt or innocence of an alleged crime, and he remains silent when it would be proper for him to speak, it is the province of the jury to interpret such silence, and determine whether his silence was, under the circumstances, excused or explained. At most, silence under such circumstances is but an implied acquiescence in the truth of the

statements made by others, and thus presumptive evidence of guilt, and in some cases it may be slight, except as confirmed and corroborated by other circumstances. But it is some evidence, and, therefore, except in those cases where the statements are made upon an occasion and under circumstances in which the individual sought to be affected could not with propriety speak, as in the progress of a judicial investigation or in a discussion between third persons not addressed to or intended to affect the accused or induce any action in respect to him, so that for him to speak would be a manifest intrusion into a discourse to which he was not a party, the evidence is competent and should be admitted. Any declaration of the individual in response to a statement so made would be admissible in evidence, and an omission to make any answer to it or to notice it like other acts of the party is to be interpreted and such effect given to it as evidence, in connection with the other circumstances of the case, as the jury in their discretion shall think it entitled to. The implication of assent to a statement affecting the guilt or innocence of an individual, from an omission to controvert, qualify, or explain it, arises from the fact that a person knowing the truth or falsity of a statement affecting his rights made by another in his presence, will naturally, under circumstances calling for a reply, deny it, if he be at liberty to do so, if he do not intend to admit it.”¹ In a Missouri case² it is said: “It is not in all instances where declarations are made in the presence and hearing of a person that these declarations can be given in evidence against him. They frequently call for no reply, and sometimes they are impertinent and deserve no notice. Unless it is shown that the party is immediately concerned, and that unless he did speak, his silence might fairly be construed into an admission, the declarations will not be admissible.”

¹ *Kelley v. People*, 55 N. Y. 573 (1874).

² *State v. Hamilton*, 55 Mo. 533 (1874).

B.

I. A. and B. are charged with the joint commission of a felony. On his examination before the committing magistrate, A. states in the presence of B. and in his hearing that he and B. committed the crime, but B. makes no response. This is not relevant, and raises no presumption against B.¹

II. On the trial of C. a witness makes certain statements as to C.'s guilt. C. makes no response. This raises no inference of guilt against C.²

III. Two watchmen took K. into custody and carried him to the station, where one of them said that K. had been robbing a man. R. soon came in and pointed to K. and said "that man has stolen my money." K. afterwards laid a bag on a shelf, which one of the officers observing, took up and found it contained money. R. said it was his bag and contained all the money he had. K., though within hearing of all that was said, remained silent. This raised no presumption against K., and the declarations of R. and the officer are irrelevant.³

IV. W. was confined in prison awaiting trial on a charge of burglary. While in his cell N. was brought to the door and asked by a police officer, in W.'s presence and hearing if he was a certain party whom she had seen near the building before the time of the burglary. N. answered, "Yes, I will swear to it." W. made no denial or response. This raised no presumption of W.'s guilt and was irrelevant.⁴

Cases I. and II. are founded on the rule that a prisoner on trial is not obliged to retort upon or deny every statement which is made during the proceedings, and as fast as they are made. Under a judicial interrogation, the prisoner has a constitutional right, under the principles of the English common law, to remain silent.

In case III. the position of the parties at the time was held by the court to bring them within the meaning of the

¹ *R. v. Appelby*, 3 Stark. 83 (1821); *contra*, *Maguire v. People*, 5 N. Y. (T. & C.) 692 (1874).

² *Burr*. 492, *Shaw, C. J.*, in *Com. v. Kenney*, *post*.

³ *Com. v. Kenney*, 12 Metc. 233 (1847); *State v. Weaver*, 57 Iowa, 732 (1892); *contra*, *Kelley v. People*, 55 N. Y. 572 (1874).

⁴ *Com. v. Walker*, 13 Allen, 570 (1866). In a New Jersey case it is said: "The quasi-judicial investigation instituted by Coroner Connery, of the city of New York, improper and informal as it was might have restrained the accused from denying or replying to the statement of Moses, and would have protected him from having any unfavorable inference drawn from his silence." *Donnelly v. State*, 26 N. J. (L.) 613 (1887), and see *Sullivan v. People*, 31 Mich. 1 (1875).

phrase, "judicial interrogation." Said Shaw, C. J. : "In some cases where a statement is made in the hearing of another in regard to facts affecting his rights, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts : first, whether he hears and understands the statement and comprehends its bearing ; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge or not ; whether he is in such a situation that he is at liberty to make any reply ; and whether the statement is made under such circumstances and by such persons as naturally to call for a reply if he did not intend to admit it. If made in the course of any judicial hearing, he could not interfere and deny the statement ; it would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. So, if the matter is of something not within his knowledge ; if the statement is made by a stranger whom he is not called on to notice, or if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence — then no inference of assent can be drawn from that silence. * * * The circumstances are such that the court are of opinion that the declaration of the party robbed, to which the defendant made no reply, ought not to have been received as competent evidence of his admission either of the fact of stealing, or that the bag and money were the property of the party alleged to be robbed. The declaration made by the officer who first brought the defendant to the watch-house, he had certainly no occasion to reply to. The subsequent statement, if made in the hearing of the defendant (of which, we think, there was evidence) was made whilst he was under arrest, and in the custody of persons having official authority. They were made by an excited, complaining party to such officers who were just putting him into confinement. If not strictly an official complaint to officers of the law, it was a proceeding very similar to it, and he might well suppose that he had no right to say anything until regularly called on to answer."

Case IV. proceeds on the same principle, viz. : the officer being present, it was in the nature of a judicial interrogation.

C.

I. G. is indicted for the murder of T. The question is, was G. in the company of T. at a certain time. Circumstantial evidence is produced to show that he was, and G. does not account for his whereabouts at that time. This raises an inference that G. was there.¹

II. A. is indicted for selling liquor without a license. The sale is proved, and A. does not produce any license. The presumption is that he has none.²

In case I. it was said: "A prisoner pressed by the force of accumulated circumstances may not unfrequently find himself in the position where he is required to account for his whereabouts on a given day, or to show how he became possessed of a given sum of money or article of personal property. The omission to produce such evidence has never been regarded as absolute and conclusive evidence of the fact in dispute. Neither the elementary writers nor the adjudicated cases furnish any such rule of evidence. The absence of such evidence, especially when it appears to be in the power of the prisoner to furnish it, creates a strong presumption of guilt, a strong inference against him and is a circumstance greatly corroborative of the truth of the evidence given upon the other side. In a doubtful case it would justify the jury in resolving the doubt against him."

Where by statute a defendant in a criminal case is allowed to testify in his own behalf (a privilege not his at common law), the question has arisen whether a refusal to

¹ *Gordon v. People*, 33 N. Y. 508 (1865); *People v. Dyle*, 31 N. Y. 573 (1860). A failure to produce evidence in his favor within his power may raise a presumption of guilt. *People v. McWhorter*, 4 Barb. 438 (1848); *Com. v. Clark*, 14 Gray, 367 (1860). But not, it seems, in Louisiana. *State v. Carr*, 25 La. Ann. 407 (1873). The failure of an accused person to produce evidence of good character raises no presumption that his character is bad, or that he is guilty of the offense charged. *State v. Upham*, 38 Me. 261 (1854); *State v. Collins*, 3 Dev. 117; *State v. O'Neal*, 7 Ired. (L.) 251 (1847); *Donohoe v. People*, 6 Park. 120 (1864).

² *State v. Simons*, 17 N. H. 83 (1845),

avail himself of this privilege raises a presumption against him. In several cases it has been held that it does not.¹ This conclusion appears to have been drawn from a consideration of the constitutional principle that no man shall be called upon to give evidence against himself. But it would seem as illogical for a court to reject this inference as it is impossible to prevent a jury from taking such fact into consideration.² The statutes of most of the States expressly prohibit such an omission from being used by the prosecution in any way to the detriment of the defendant. But in the absence of such a provision it is difficult to see why such a presumption may not arise, and be taken into consideration by a jury. Chief Justice Appleton, of Maine, holds to this view and argues it at length in several cases decided by him where this question was raised. "The statute authorizing the defendant in criminal proceedings to testify at his own request," says he,³ "was passed for the benefit of the innocent and for the protection of innocence. The defendant in criminal cases is either innocent or guilty. If innocent, he has every inducement to state the facts which would exonerate him. The truth would be his protection. There can be no reason why he should withhold it and every reason for its utterance." But where a person does testify in his own behalf the fact that he does not controvert an important statement of the witnesses against him, and which is within his personal knowledge, raises the presumption that it is true.⁴

¹ *Beavers v. State*, 58 Ind. 530; *McKenzie v. State*, 36 Ark. 334; *People v. Trier*, 36 Cal. 522; *Ruloff v. People*, 45 N. Y. 213; 5 Lans., 361 (1871); *Com. v. Harlow*, 110 Mass. 411 (1873).

² See *State v. Cameron*, 40 Vt. 555.

³ *State v. Cleaves*, 59 Me. 300 (1871); *State v. Lawrence*, 57 Me. 574; *State v. Bartlett*, 55 Me. 200.

⁴ *Comstock v. State*, 14 Neb. 205 (1883); *Stover v. People*, 56 N. Y. 315 (1874).

PART VI.

GENERAL RULES.

(553)

CHAPTER XXI.

GENERAL RULES AS TO PRESUMPTIONS.

RULE 117. — A “presumption” is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved.

Sub-Rule 1. — *A presumption of law is a rule of law that a particular inference shall be drawn by a court or jury from a particular circumstance.*

Sub-Rule 2. — *A presumption of fact is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved.*

“Presumptions are of two kinds, natural and legal or artificial. The natural presumption is when a fact is proved wherefrom, by reason of the connection founded on inference, the existence of another fact is directly inferred. The legal or artificial presumption is where the existence of the one fact is not direct evidence of the existence of the other, but the one fact existing and being proved, the law raises an artificial presumption of the existence of the other.”¹

A presumption is an inference as to the existence of a fact, not actually known, arising from its usual or necessary connections with others which are known.”²

“A presumption of any fact is properly an inference of that fact from other facts that are known; it is an act of

¹ *Gulick v. Loder*, 18 N. J. (L.) 72 (1882).

² *Patterson v. McCauland*, 3 Bland Ch. 71 (1830).

reasoning and much of human knowledge on all subjects is derived from that source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment.”¹

“Presumptions of fact are but inferences drawn from other facts and circumstances in the case, and should be made upon the common principles of induction.”²

“Presumptions of fact are at best but mere arguments and are to be judged by the common and received tests of the truth of propositions and the validity of arguments.”³

“Presumption is allowed to prove facts, even in criminal cases; and one of the highest modes of proof is to show the existence of circumstances which could not have existed if the fact proved had not existed. And what is this kind of proof but presumption. A single circumstance may have little strength, and of itself afford no foundation; but when joined to many more of the same nature, all fitting each other and having the same relation, the whole united may form an arch strong enough to support a presumption of the most important fact.”⁴

“Juries have the right to infer what a man intends to do and what he actually has done, from his conduct, beyond the positive testimony in a case.”⁵

“Presumptions of fact are conclusions drawn from particular circumstances. They are such as are formed [found?] by experience to be usually consequent upon or coincident with the facts presumed, and either do not arise or are rebutted if they do not correspond with or are not adequate to account for the circumstances actually proved.”⁶

In *Justice v. Lang*,⁷ it is said: “Presumptions of law are, in reality, rules of law and part of the law itself, and the

¹ Abbott, C. J., in *R. v. Bardett*, 4 B. & Ald. 161.

² Mason, J., in *O’Gara v. Eisenlohr*, 33 N. Y., 308 (1898).

³ Lawhorn v. Carter, 11 Bush, 7 (1874); *Bach v. Cohn*, 3 La. Ann. 108 (1848).

⁴ Waties, J., in *Frost v. Brown*, 3 Bay, 133 (1798).

⁵ *Union Bk. v. Middlebrook*, 33 Conn. 100 (1886).

⁶ *Sutphen v. Cushman*, 25 Ill. 187 (1864).

⁷ 53 N. Y. 323 (1873).

court may draw the inference whenever the requisite facts are developed, whether in pleading or otherwise, while all other presumptions, however obvious, being only inferences of fact, can not be made without the intervention of a jury.¹ The presumption of innocence, of sanity, that all men are free, etc., are examples of presumptions of law. So, too, a promise will be implied from a legal obligation. But the presumption of the existence of one fact from the existence of another, that is, the process of ascertaining one fact from the proof of another fact, is within the exclusive province of the jury.² The usual presumption as to a ship which becomes distressed, or founders without apparent cause, shortly after leaving port, is that she was unseaworthy when she sailed; but the presumption is one of fact, and for the jury, and not of law, for the court.³ So, long possession is evidence of a grant; but the cogency of such evidence is for the consideration of the jury, under instructions from the court, and subject to the power of the court to set aside the verdict if against evidence.⁴ Whether an agreement to pay interest is to be presumed from the established usage and custom is a question for the jury.⁵ Where there is a dispute as to the facts which go to prove the making of a new promise, whether a sufficient promise has been made to take the case out of the statute of limitations, is a mixed question of law and fact for the jury.⁶ When there is a transfer of property, the ownership of which carries with it a legal obligation or a grant of an estate subjecting the grantee to certain liabilities, the assumption of the obligation and liability will result by legal implication from the acceptance of the transfer or of the estate. But both the transfer and grant are executed contracts — completed acts, vesting the property, or estate, in the transferee or grantee

¹ Best on Presumptions, 18.

² 1 Green's Ev., sec., 48.

³ *Foster v. Steele*, 3 Bing. (N. C.) 892.

⁴ Best on Presumptions, 60.

⁵ *Meech v. Smith*, 7 Wend 315.

⁶ *Clark v. Dutcher*, 9 Cow. 674.

and the parties take *cum onere*.¹ So, when an agreement *inter partes* is subscribed by both the contracting parties, a promise or covenant will be implied by one to do or perform that which is stated to be the consideration of the acts expressly undertaken by the other.² These presumptions are usually regarded as legal presumptions and reduced to fixed rules, but whether they are strictly so is not material. But presumptions of fact, which come within the province of the jury, are said to be but mere arguments, of which the major premise is not a rule of law, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments.³ Presumptive evidence and the presumptions or proofs to which it gives rise are not indebted for their probative force to any rules of positive law; but juries, in inferring one fact from others which have been established, do nothing more than apply, under the sanction of the law, a process of reasoning, the force of which rests on experience and observation, and such influences are presumptions of fact.⁴ A promise is not, under all circumstances, implied from the fact that a promise has been made by another party to which that sought to be implied would be the correlative, and so the parties placed under mutual obligations to each other.”⁵

In *Hicks v. Silliman*,⁶ the court said: “When certain facts are admitted or proven, the court takes notice, without further proof, of all such presumptions and inferences arising from them as are warranted by uniform experience, and also all such consequences as are known to flow from the laws which govern matter, and which are applicable to the proven or admitted facts. For instance, when it is shown that the roof of a house, without gutters or other obstruc-

¹ *Johnson v. Underhill*, decided by this court February 11, and cases cited by Folger, J.

² *Fordage v. Cole*, 1 Sandf. 319.

³ 1 Greenl. Ev., sec. 44.

⁴ Best on Pres. Ev., p. 15, sec. 14; *Morgan v. Ravey*, 6 H. & N. 265.

⁵ *Churchward v. Coleman*, L. R. 1 Q. B. 173.

⁶ 93 Ill. 261 (1879).

tions, is sloping and projects over an adjoining building, the court may well conclude that the drip in time of rains will fall on such adjacent building. And the opinion of any number of witnesses to that effect would scarcely strengthen the conclusion. So, where it is shown that land of one person slopes towards an adjacent tract belonging to another, and the owner of the former is threatening by artificial means to gather the surface water from his own and other contiguous lands in large quantities, and by means of ditches is preparing to conduct it to a point on his own land near the adjacent land, toward which his own slopes, and there permit it to escape, it does not require the opinions of witnesses to establish the conclusion that if the surface water is permitted to be thus collected and discharged, it would certainly flow upon such adjacent land in unnatural and undue quantities. And in such case, where it further appears that the land upon which this undue proportion of surface water is about to be thrown is so unusually low and wet that it is barely susceptible of cultivation, and without any drainage whatever, the court would be fully warranted, without further testimony, in reaching the conclusion that the land would be thereby injured, and the owner entitled to redress. It is the right and duty of courts, in determining what conclusions or results may be fairly drawn from testimony, to avail themselves not only of their knowledge and experience in the practical affairs of life, but also of matters of science. A knowledge of physics is often indispensable in determining what inferences shall be drawn from an existing state of things. The laws of gravitation, hydraulics, and mechanics are of constant application in judicial inquiries; and some of them may be usefully applied here."

Illustrations.

I. A boy under fourteen commits a crime. The presumption that he is legally incapable is a presumption of law.¹

¹ *Ando*, ch. XIV.

II. A woman in the presence of her husband robs a man. The presumption that she acted under the coercion of her husband is a presumption of law.¹

III. A man kills another with a deadly weapon. The presumption that he intended his death is a presumption of law.²

IV. A letter is mailed to a party at a place where he usually receives his letters and transacts his business. There is no presumption of law that he received it. A presumption of fact that he did may, however, be drawn.³

V. A. sues B. on a promissory note. It is proved that a subsequent demand between A. and B. on the same account and arising from the same cause has been discharged. This raises a presumption of the payment of the note. But it is a presumption of fact for the jury and not one of law for the court.⁴

In case IV., it was said: "The learned judge of the court below fell into an error in affirming the first point of the defendants that the *law* presumes a note mailed to the plaintiff at a place where he usually receives his letters and transacts his business, was received by him by due course of mail. A strong probability of its receipt may arise, and as a fact, in connection with the other circumstances, it was right to refer it to the jury. But in their hands it became not a *legal* presumption binding on them as a rule of law, but only a natural probability, as it is termed; that is an inference of fact of the probability of the actual receipt, by mail, of the letter containing the note, arising from all the circumstances in evidence. A legal presumption is the conclusion of law itself of the existence of one fact from others in proof, and is binding on the jury, *prima facie* till disproved, or conclusively, just as the law adopts the one or the other as the effect of proof. The learned judge was, no doubt, misled by the generality of the language of Mr. Greenleaf, in his treatise upon Evidence, in relation to letters sent by mail.¹ But the authorities cited by him for the statement, all refer

¹ *Ante*, ch. XIV.

² *Ante*, ch. XIV.

³ *Tanner v. Hughes*, 53 Pa. St. 299 (1866).

⁴ *Ham v. Barret*, 28 Mo. 388 (1859).

Vol. I, sec. 40.

to notice of the dishonor of bills or non-payment of notes. The necessity of notice of non-acceptance or non-payment, and the inconvenience of giving it by special messenger to those residing at a distance, led to the adoption of the post by commercial usage which has settled into law. Hence the remark of the late C. J. Gibson, in *Jones v. Lewis*,¹ that no judge has said the post-office is not a legal place of deposit when the indorser lives in the country, or at such distance as would make the employment of a special messenger burdensome. But that this rule is the mere creation of commercial usage and not the result of the general principles of conduct which lie at the foundation of legal conclusions, is rendered palpable by his admission in that case that notice by deposit in the post-office to one living in the same city is insufficient. This was expressly decided at the same time in *Kraum v. McDowell*.² There is another class of cases where, by the acts of parties, the mail is made the vehicle of their communications, as where a proposition by mail is accepted by the same channel. But by no law of the United States in reference to the mails, or of the State, is the post made a legal channel of communication which a party may adopt and make compulsory upon his correspondent. It was error, therefore, to hold that the law concludes that the note was received by the plaintiff, from the mere fact of a deposit of it in a letter mailed at a distant office, directed to him at the place where he usually received his letters and transacted his business. The purpose here was to show payment of the note. This was done by the production of the note itself, without a receipt or mark of payment or cancellation upon it, and without any evidence of its delivery to the plaintiff except the deposit in the mail. Payment was, therefore, to be proved by a double presumption at law, first, the legal presumption of delivery from the deposit in the post-office, and, secondly, the presumption of its return into the hands

¹ 8 W. & S. 15.

² 2 W. & S. 123.

of the drawees by delivery on payment. Now, while the facts, when all collected by the jury, might have satisfied them that the note was actually in the possession of the plaintiff, by receipt through the mail, and found its way back into the hands of the defendants by their payment of it; it certainly was erroneous to instruct them that the possession of the note by the plaintiff was a conclusion of law from the fact of mailing it to him."

In case V. it was said: "The instructions asked by the defendant and refused by the court, of which complaint is made, were properly refused, inasmuch as they required the court to declare that to be a presumption of law which was only a presumption of fact, to be raised or not as the jury would determine from the circumstances in evidence. There are presumptions of law and presumptions of fact. The former are of a nature to exclude all contrary proof, and which the court will not suffer the jury to disregard; whilst the latter are founded in experience, and may be raised or not as the jury may determine, and for a disregard of which the court grants or refuses a new trial, as upon the evidence in all other cases of trial by jury. Where a presumption is one of fact merely, the court is not warranted in declaring it to the jury as a presumption authoritatively raised by law, but should direct them that from the evidence it is their province to determine whether they will raise the presumption or not. The jury, looking to the bench for the law, would naturally take it that such a declaration was binding and left them no discretion. Where the facts are before the jury, the presumptions or inferences they warrant are questions purely for them.¹ Where presumptions of fact founded in experience and in the usual course of the dealings of men are not repelled by contrary evidence they should be respected by juries, and they have no power arbitrarily to reject them. They must stand until they are overthrown by contrary proof.

¹ Best on Presumptions, 46, 51.

Presumptions of payment arising against claims for debt alleged to remain unpaid, while subsequent demands due on the same account and arising from the same cause are proved or admitted to have been regularly discharged, are presumptions of fact liable to be repelled by proof to the contrary, and to be found to have application to a case by a jury subject to the power in the court of granting a new trial." It is held in California that it is error for the court to instruct the jury that certain proof adduced raises a presumption of fact, for this is "charging the jury with respect to matter of fact," a thing prohibited by the constitution of that State.¹

In *Holmes v. Hunt*,² it was held that a statute making the report of an auditor *prima facie* evidence upon such matters as are embraced in the order to him was constitutional. In an exhaustive opinion Gray, C. J., reviews the instances of the creation of presumptions of law by the Legislature. "The constitutional power of the Legislature," says he, "to prescribe rules of evidence is well settled."³ This power has been often exercised by the Legislature, with the sanction of the courts, so as to change the burden of proof, or to affect the question which shall be deemed *prima facie* evidence at the trial before the jury. For instance the Legislature may enact that the deed of a collector of taxes shall be *prima facie* evidence that the land has been sold for non-payment of taxes at a time and in a manner authorized by law.⁴ So it may enact that the record of a deed shall be evidence that it has been duly acknowledged or proved before a magistrate without any record of the certificate or of the proof of acknowledgment.⁵ A statute providing that a notary's protest of a promissory note

¹ *People v. Walden*, 31 Cal. 388 (1877); *People v. Carrillo*, 54 Cal. 63 (1879); *Stone v. Geyser Mining Co.*, 52 Cal. 517 (1877).

² 122 Mass. 505.

³ *Parsons, C. J.*, in *Kendall v. Kingston*, 5 Mass. 524, 534; *Washington, J.*, and *Marshall, C. J.*, in *Ogden v. Saunders*, 12 Wheat. 213, 263, 349.

⁴ *Pillow v. Roberts*, 13 How. 473, 476; *Callaman v. Hurley*, 93 U. S. 337; *Hand v. Ballou*, 2 Kernan, 541; *Cooley on Const. Lim.* (3d ed.) 367, 368.

⁵ *Webb v. Denn*, 17 How. 576.

should be evidence of the facts stated thereon has been held by the Supreme Court of Maine to be constitutional, and applicable to a protest made before its passage.¹ By our own statutes, the recorded certificate of two witnesses is made sufficient evidence of an entry to foreclose a mortgage, and the affidavit of the mortgager himself evidence that the requisitions of a power of sale have been complied with.² Mr. Justice Story gave the fullest effect to an act of Congress which provided that the certificate of a vice-consul, that a master had refused to take a destitute seaman on board, should be *prima facie* evidence in a suit against the master for the penalty imposed on him for such refusal.³ The statutes of this Commonwealth have imposed upon the defendant in criminal prosecutions the burden of proving any license, appointment or authority, relied on as a justification, which the Commonwealth, but for these statutes, would have been obliged to disprove.⁴ Even statutes providing that in prosecutions for the unlawful sale of intoxicating liquors, delivery in or from any building or place other than a dwelling-house, 'shall be deemed *prima facie* evidence of a sale,' have been held constitutional.⁵ In *Goshen v. Richmond*,⁶ it was held that the provisions of the statutes of 1845,⁷ reenacted in the general statutes,⁸ that 'the validity of a marriage shall not be questioned in the trial of a collateral issue, on account of the insanity or idiocy of either party, but only in a process duly instituted

¹ *Fales v. Wadsworth*, 22 Me., 553.

² Gen. Stats., chap. 140, secs. 2, 42, 43; *Hawks v. Brigham*, 16 Gray, 561; *Ellis v. Drake*, 8 Allen, 161, 163; *Thompson v. Kenyon*, 100 Mass. 106; *Childs v. Dolan*, 5 Allen, 319; *Field v. Gooding*, 103 Mass. 310, 312.

³ U. S. St., February 28, 1803, sect. 4; U. S. Rev. Stats., sect. 4578; *Matthews v. Offey*, 3 Sumn., 115, 123.

⁴ Sta. 1844, ch. 103; 1864, ch. 121; Gen. Stats., ch. 172, sec. 10; *Commonwealth v. Thurlow*, 24 Pick. 374; *Commonwealth v. Kelly*, 10 Cush. 69; *Commonwealth v. Lahey*, 8 Gray, 459; *Commonwealth v. Carpenter*, 100 Mass. 304.

⁵ *State*, 1852, ch. 322, sec. 12; 1855, ch. 215, sec. 34; *Commonwealth v. Williams*, 6 Gray, 1; *Commonwealth v. Rowe*, 14 Gray, 47. See, also, *State v. Cunningham*, 28 Conn. 195; *State v. Hurley*, 54 Me., 562; U. S. Stat. July 18, 1866, sec. 4; U. S. Rev. Stats., sec. 3062.

⁶ 4 Allen, 458.

⁷ Chap. 222.

⁸ Chap. 107, sec. 2.

in the lifetime of both parties for determining such validity,' applied to marriages existing at the time of its passage; and Mr. Justice Metcalf, delivering the opinion of the court, said: 'The defendants deny that it was the intention or within the power of the Legislature to make this enactment retrospective, that is, to prohibit the admission of evidence to show the invalidity of previously existing marriages. But the court do not doubt either that intention or that power of the Legislature. That body has unquestionable authority to change the common-law rules of evidence, to prescribe the modes of proof, and to direct who may or may not be competent witnesses. And this authority has often been exercised. Thus, the burden of proof, which by the common law is on one party, has in certain cases been put by statute, on the other. And recent statutes have so far changed the pre-existing rules of evidence, as to make all persons (with very few exceptions) who have sufficient understanding, competent witnesses, not only in the trial of other's actions, but also of their own. Those statutes have been held to render these persons competent to testify, not only concerning matters of which they had knowledge before they were made competent, but also in cases that were pending before.'¹ The existing witness act omits the exception (contained in the statutes in force when that opinion was delivered) of the case in which one party to the original contract or cause of action is dead or insane, and all other exceptions, in civil cases, save that of private conversations between husband and wife.² In a very recent case, it was held by the Court of Appeals of New York, that a special statute authorizing testimony as to the title to a certain estate to be perpetuated under the direction of the court of chancery, and making it *prima facie* evidence of the facts set forth in the examination of the witness, if the chancel-

¹ See, also, *Monson v. Palmer*, 8 Allen, 551, 556.

² St. 1870, p. 223.

lor should be of opinion that the depositions furnished good *prima facie* evidence of such facts, but not giving any adverse party the right of cross-examination, was within the constitutional authority of the Legislature. And the court said: 'The rules of evidence are not an exception to the doctrine that all rules and regulations affecting remedies are, at all times, subject to the modification and control by the Legislature. The changes which are enacted from time to time may be made applicable to existing causes of action, as the law thus changed would only prescribe the rules for further controversies. It may be conceded for all the purposes of this appeal, that a law that should make evidence conclusive, which was not so necessarily in and of itself, and thus preclude the adverse party from showing the truth, would be void, as indirectly working a confiscation of property, or a destruction of vested rights. But such is not the effect of declaring any circumstance or any evidence, however slight, *prima facie* proof of a fact to be established, leaving the adverse party at liberty to rebut and overcome it by contradictory and better evidence. That this may be done is well settled by authority.'¹ The statutes allowing every party to testify in his own behalf, even after the death of the other party to the original contract or cause of action, the statutes making deeds of public officers, or conveyances recorded at the mere request of the grantee, or *ex parte* affidavits, without opportunity of cross-examination, *prima facie* evidence, and the statutes making particular facts *prima facie* evidence against defendants in criminal prosecutions, all appear to us to have worked greater changes in the position of the parties at the trial before the jury, than a statute that merely gives the effect of *prima facie* evidence to an auditor's report, made after full hearing of both parties, and upon a matter involving the investigation of accounts, which can not, in the view of the Legislature that framed the statute, and of the court that makes the

¹ Howard v. Mert, 64 N. Y. 263, 268.

order of reference in the particular case, be conveniently or intelligently tried by a jury, without the assistance of a previous examination and report by an auditor. And we do not find anything, in the authorities cited at the bar, that creates any doubt in our minds upon this subject. In *United States v. Rathbone*,¹ the only point decided was that the constitution and laws of the United States did not authorize a Federal court, sitting in the State of New York, to order a case to be referred to arbitration, in accordance with a statute of that State. Mr. Justice Thompson said: 'How far this view of the case may affect the validity of State law is a point not drawn in question, or intended to be considered.'² And the constitutionality of that statute has since been affirmed by the Supreme Court of that State.³ In *Plimpton v. Somerset*,⁴ and *Copp v. Hanniker*,⁵ actions for damages for defects in highways, not involving any investigation of accounts, had been referred to commissioners or referees, under statutes that provided that their reports should be *prima facie* evidence upon a subsequent trial before a jury. The decision of a majority of the court in *Plimpton v. Somerset*, that such a statute, as applied to such a case, was unconstitutional, could not be extended to the case of an account, consistently with the previous decisions of the same court in *Brown v. Kimball*,⁶ and *Stoddard v. Chapin*. In *Cobb v. Hanniker*,⁷ the court held the provision for the appointment of a referee to be valid, and did not decide upon the validity of that part of the statute which provided that his report should be evidence upon a trial before a jury; and the only judge, who made any remarks upon that point, said in regard to the auditor law of New Hampshire of 1823, which was copied from our

¹ 2 Paine, 578.

² 2 Paine, 583.

³ *Lee v. Tillotson*, 24 Wend. 337.

⁴ 23 Vt. 233.

⁵ 55 N. H. 179.

⁶ 12 Vt. 617.

⁷ 15 Vt. 443.

statute of 1817: 'The validity of an act, which has been in such extensive operation and universally acquiesced in for fifty years, will probably not be questioned.'¹ The constitutionality of the New Hampshire statute of 1823 has since, upon elaborate consideration, been fully established.² In *King v. Hopkins*,³ which was an action on the case for flowing the plaintiff's land, it was decided that the provision which made the report of referees evidence at the trial before the jury was unconstitutional. But the weight of that decision as an authority is greatly impaired, to say the least, by the fact that it was made, under the peculiar judicial system existing at the time in that State, by one justice of the Supreme Court of Judicature, and one judge of the Circuit Court, against the dissent of the chief justice of the Superior Court, and reversing the ruling of the third justice of the Superior Court, who presided at the trial; so that the final result was against the opinion of a majority of the judges of the highest court of the State. And we are not now required to pass upon the validity of such a provision, as applied to a case which does not call for the investigation of accounts, but presents a simple issue of fact or damages, suitable for the determination of a jury in the first instance. The only case cited by the learned counsel for the defendant, which supports his position, is *Francis v. Baker*, recently decided by the Supreme Court of Rhode Island, in which a statute, substantially corresponding to our own, was held unconstitutional, as impairing the right to trial by jury. The respect due to a decision of the highest court of a neighboring State, and the ability of the argument which has been addressed to us, have induced us to treat the matter at more length than we should otherwise have thought necessary; but after full consideration, we are unanimously of opinion that neither that decision, nor the reasons assigned in support of it, are sufficient to justify

¹ 55 N. H. 206.

² *Doyle v. Doyle*, 56 N. H. 567; *Perkins v. Scott*, 57 N. H. 55.

³ 57 N. H. 334.

us in overturning the law of this Commonwealth, as established, upon what appears to us to be firm foundations, by the practice of more than half a century."

RULE 118. — A presumption must be based upon a fact,¹ and not upon inference or upon another presumption.²

Illustrations.

I. A. sues B. for deceit in fraudulently representing the value of the property of a corporation and inducing him to purchase stock therein. The articles of association containing these false statements were filed of record as required by law. There is no evidence of fraudulent representations made to A. inducing him to purchase the stock. It can not be presumed that A. saw these articles and was induced to purchase relying on the statements therein contained.³

II. B. asks to be discharged from custody on a *habeas corpus* because the grand jury has found no indictment against him. It only appears that a term of court has passed since B.'s imprisonment. The law will presume that court was held and a grand jury impaneled according to law. But there is no presumption that the grand jury heard evidence in B.'s case.⁴

III. The question was whether there was any other property on which to levy an execution except a certain negro boy. It was proved that the sheriff had levied only on the negro boy. From this alone it could not be presumed that there was no more property.⁵

IV. A contract between an agent and an insurance company provides, as a part of his compensation, that he shall receive a certain commission on all premiums paid on renewals of policies as well as when they are first taken. Being discharged by the company he brings suit and claims that since his discharge there have been renewals of policies taken by him on which he is entitled to commissions. There is no proof that any policies have been renewed or premiums paid. This can not be presumed.⁶

V. It is sought to be shown that the driver of a street car which ran over and injured a child was negligent. It is proved that the drivers on

¹ *Richmond v. Aiken*, 25 Vt. 324 (1853); *Doolittle v. Holton*, 26 Vt. 538 (1854); *Brunswick v. McKean*, 4 Me. 508 (1827); *Ellis v. Ellis*, 58 Iowa, 720 (1892).

² *Douglas v. Mitchell*, 35 Pa. St. 440 (1860). "Presumptions must always rest upon acknowledged or well established facts, and not upon presumptions." *Richmond v. Aiken*, 25 Vt. 326 (1853).

³ *McAlcer v. McMurray*, 58 Pa. St. 126 (1868).

⁴ *People v. Hessing*, 38 Ill. 410 (1862).

⁵ *Pennington v. Yell*, 11 Ark. 236 (1850); and see *U. S. v. Ross*, 92 U. S. 283 (1875).

⁶ *Manning v. Insurance Co.*, 100 U. S. 693 (1879); *Wheelton v. Hardesty*, 8 El. & Bl. 232 (1857).

the line are allowed only a limited time for rest and sleep. The presumption can not arise that the driver was negligent. It is proved that the driver was asleep at the time. The presumption arises that he was negligent.¹

VI. A. claims certain property as his—*e.g.*, a negro boy—from B. B. obtained the property by purchase at an execution sale of the property of C. The question is whether A.'s presence at the sale raises a presumption of his acquiescence so as to estop him. It would if A. is proved to have been present. It would not if it is only proved that A. was near by at the time.²

“Not a word of testimony,” it was said in case I., “appears to have been given by the plaintiff to show that he was induced to purchase any stock in the company by direct representations, true or untrue, by any person. This essential was attempted to be supplied by presumptions: one to stand as a postulate, and another as the inference. This is not admissible. I can not well conceive of a case where a presumption of fact can ever be drawn from presumptions of the same kind. The practical operation of the theory in this particular is that it is to be presumed that the plaintiff must have seen and inspected the certificate of organization of the company, either in the auditor general's or recorder's office, and by its false presentation he is presumed to have been induced to purchase the stock in question. Neither one nor the other of these propositions asserts a natural or even probable result. They are not such presumptions as to induce the belief that it would be most likely that the plaintiff would examine the certificate before purchasing. That would depend on many things—amongst others the business habits of the man, and his convenient opportunity. The paper itself, if seen, would hardly, if in proper form, have held out any very peculiarly lively inducements to buy. A much greater probability is that the plaintiff purchased the oil stocks because such stocks were just then in great demand.”

In case II. it was said: “The record fails to show that

¹ Philadelphia City Passenger R. Co. v. Henrice, 92 Pa. St. 431 (1880).

² Danley v. Rector, 10 Ark. 211; 50 Am. Dec. 243 (1849).

the grand jury heard evidence or acted upon the accusation against him. The allegation that such action was had by that body was not proved. The law will not presume that the evidence was heard and that they ignored a bill. Although it may be a legal presumption that a court was held at the time fixed by law and a grand jury was regularly impaneled, still it will not be presumed that they acted upon a particular case."

In case III. it was said: "There was an effort to raise a presumption upon a presumption. The presumption that there was no more property is based upon the presumption that the sheriff did his duty. That is to say, it was his duty to levy the whole debt if there was sufficient property in his county; as he did not levy the whole debt—*ergo*, then there was no more property in his county. Now, the law will not presume on such a basis as this. Legal presumptions must be based upon facts and not upon presumptions."

In case IV. it was said: "The defendant might have resorted to a *subpoena duces tecum*, or to an order of the court to produce papers and books, or, perhaps, to a bill of discovery. He did neither. He simply proved as a fact, that there were life policies in existence, secured through his agency, renewal premiums upon which fell due before the suit was brought. His evidence stopped there, and he now complains that the jury was not allowed to presume from that fact that the renewal premiums had been paid to the plaintiff, and to presume it against a party who was not in the wrong, a party who had rightfully dismissed him from his agency, and who was under no obligation to collect the premiums at all. But was that a conclusion which the jury should have been permitted to draw from the fact proved? It is error to submit to a jury to find a fact of which there is no competent evidence. From the fact that a debt existed, it does not follow as a necessary or even reasonable sequence that it has been paid. Nor is there any presumption of its payment upon which a jury can

act. Certainly none until after the lapse of twenty years. Much less can such a presumption arise in regard to the payment of renewal premiums upon policies of insurance, such premiums not being debts due to the insurers, and not being collectible as debts. We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with, or relation to, the established fact from which it is inferred. If it has not it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved. Remarking upon this subject in *United States v. Ross*,¹ we said: 'Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed.' Referring to the rule laid down in *Starkie on Evidence*,² we added: 'It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences.'³ A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependant presumption.⁴ If these principles be applied to the present case, the inadmissibility of the presumption which the defendant contends the court should have permitted the jury to draw becomes apparent. That renewal premiums to a certain amount upon which he was entitled commission, had been paid to the company was the ulti-

¹ 99 U. S. 281, 284.

² p. 80.

³ Best on Ev. 35.

⁴ *Douglass v. Mitchell*, 35 Pa. St. 440.

mate fact which was necessary to be proved. What the evidence did prove was, that there were policies in force on the 2d of June, 1871, the annual premiums upon which were \$87,000; that he would be entitled to commissions upon renewals of the policies, if they should be thereafter renewed, and if the renewal premiums should be paid to the company, and that these premiums were to be collected by his sub-agents and paid over by them. These were the primary facts. Everything more was left to presumption. The jury, therefore, were to presume that the policies did not lapse, and that they were renewed. Built on this presumption was another, namely, that the renewal premiums were paid to the agents; and upon this a further presumption, that the premiums had been paid over by the agents to the company, or had been immediately collected by it. This appears to us to have been quite inadmissible. A verdict of a jury found upon such evidence would have been a mere guess."

In case V. it was said: "The fact to be proved was whether the driver of car No. 127 had been guilty of negligence upon the occasion in question, in consequence of which the child, Charles Henrice, had been run over and injured. Was the evidence objected to of such a character as tended to prove this fact? It was undoubtedly competent to prove the condition of the driver at the time the accident occurred; that he was intoxicated, or absent, or for any other reason incompetent to attend to his duties.¹ These were specific matters which might have been proved; but how the fact that other drivers and other conductors were allowed only a certain number of hours for sleep and rest could affect the question of this particular driver upon this particular occasion is not apparent. It is easy to see, however, how such evidence might seriously influence the jury and increase the damages. When a fact is established

¹ *Pennsylvania Railroad Co. v. Books*, 7 P. F. Smith, 339; *Mansfield Coal and Coke Co. v. McEnery*, 10 Morris, 188.

in a cause by evidence we may properly be allowed to draw therefrom such inferences as are logically deducible from it. Thus if it be shown that the driver was asleep or intoxicated at the time of the accident, a presumption of negligence would properly arise. But the fact from which such inference is to be drawn must first be established. It will not do to presume that he was in the condition referred to from some remote fact in no way connected with the case, and upon this presumption base the additional presumption of his negligence. This would be to found a presumption upon a presumption which is never allowed. A presumption should always be based upon a fact, and should be a reasonable and natural deduction from such fact. The true rule was correctly stated by Mr. Justice Thompson in *Douglass v. Mitchell's Executors*:¹ 'That as proof of a fact, the law permits inferences from other facts, but does not allow presumptions of fact from presumptions. A fact being established, other facts may be, and are often ascertained by just inferences. Not so with a mere presumption of a fact; no presumption can with safety be drawn from a presumption; there being no fixed or ascertained fact from which an inference of fact might be drawn, none is drawn.' What has been said applies to the charge of the court embraced in the fourth assignment, as well as to the offers of evidence. There was no evidence that the driver of car No. 127 was in any way rendered incompetent to perform his duties in a proper and careful manner by reason of the severity of his labors or the loss of rest and sleep. In the absence of such evidence we have but a mere presumption, and upon this it was not competent to construct the further presumption of his negligence."

In case VI. it was said: "It remains to be seen whether the plaintiff in this case was in fact present at the time the slave in suit was set up and sold; for until he is proven

¹ 11 Casey, 443.

positively to have been present at the time of the sale to presumption of fraud arises which could affect him even in a court of equity. It is a rule of evidence which lies at the foundation of all presumptive evidence or deduction from facts that the facts themselves from which these presumptions arise must be clearly and satisfactorily proven. For, if such were not the case, it would be but raising presumption upon presumption, whereas the very existence of presumption depends upon their usual and necessary connection with known facts. It is by the application of this rule that a third person who is present when property to which he has claim, is offered for sale, and who stands by in silence and suffers an innocent purchaser to pay his money for it, is chargeable with fraud. When it is clearly proven that he was present at the time of the sale, and so situated that he must have been advised of the fact that his property was about being sold and he remains silent, a presumption of intention to defraud the purchaser arises and attaches to his conduct. But then in order to raise this presumption, it must be first positively proven that he was present at the very time the sale of that particular property took place. When these rules are applied to the evidence in this case it will be found that there is no positive proof that the plaintiff was present when this particular slave was sold. Most of the witnesses have no positive recollection that he was there at any time, but are of the impression that he was. One witness only, says he was there certainly. That witness says: 'I do not know whether plaintiff was present when the negro sued for was sold or not, but I saw him when the sheriff was selling, some time during the progress of the sale of the negroes under execution against my father. They were some time selling the whole lot of negroes,—some nine or ten in number.' Therefore, under no state of the case can the plaintiff be affected by this principle, as the proof fails to establish the fact of his presence at the time of the sale of the boy in suit."

RULE 119. — A presumption can not contradict facts or overcome facts proved.

“They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the facts or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appears in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so, it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be, that notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed.”¹

RULE 120. — A rebuttable presumption of law being contested by proof of facts showing otherwise, which are denied, the presumption loses its value, unless the evidence is equal on both sides, in which case it should turn the scale.

In *Graves v. Colwell*² it was said: “The plaintiff made out a *prima facie* case by availing himself of the presump-

¹ *Galpin v. Page*, 18 Wall. 364 (1873). Presumptions of fact are not binding on a jury. *Hamilton v. People*, 29 Mich. 183 (1874). Presumptions stand only till they are overcome by facts. *Whitaker v. Morrison*, 44 Am. Dec. 627 (1846); *Van Buren v. Cockburn*, 14 Barb. 123 (1832). “The evidence to support a natural presumption of a fact must be such as to lead the mind to a conscientious belief of its existence beyond a reasonable doubt.” *Hunt v. Hunt*, 3 Metc. 175; 37 Am. Dec. 130 (1841).

² 90 Ill. 615 (1878).

tion of law that the father and not the son was intended by the deed from French.¹ It then devolved on defendants to introduce evidence sufficient to rebut this legal presumption, and, as they did so, they would have been entitled to a verdict if the case had stood still there. The case of the defendants, as disclosed by their testimony, considered in and of itself, rebutted the legal presumption, and thereby the *onus* was shifted back to plaintiff, and he was bound to produce proofs sufficient to overcome, or at least equal in probative force, the case of the defendant. Plaintiff did introduce certain rebutting evidence, and, he having done so, the verdict of the jury should have been in conformity with the preponderance of evidence on the whole case. If the testimony of defendants was of greater probative force than the rebutting evidence of plaintiff added to the probative value of the legal presumption, then the verdict should have been for them. If the evidence in the concrete case, including the evidential weight of the presumption of law, was in equilibrium, then the plaintiff might still have availed himself of the presumption of law, as an arbitrary rule of law, and been entitled to recover. It has been said that the presumptions of law derive their force from *jurisprudence* and not from *logic*, and that such presumptions are arbitrary in their application. This is true of irrebuttable presumptions, and, primarily, of such as are rebuttable. It is true of the latter until the presumption has been overcome by proofs and the burden shifted; but when this has been done, then the conflicting evidence on the question of fact is to be weighed and the verdict rendered, in civil cases, in favor of the party whose proofs have most weight, and in this latter process the presumption of law loses all that it had of mere arbitrary power, and must necessarily be regarded only from the standpoint of logic and reason, and valued and

¹ Lepiot v. Browne, 6 Mod. Rep. 198; Kincaid v. Howe, 10 Mass. 208; Padgett v. Lawrence, 10 Paige, 170; State v. Vittum, 9 N. H. 519; 2 Wharton's Ev., sec. 1273.

given effect only as it has evidential character. Primarily, the rebuttable legal presumption affects only the burden of proof, but if that burden is shifted back upon the party from whom it first lifted it, then the presumption is of value only as it has probative force, except it be that on the entire case the evidence is equally balanced, in which event the arbitrary power of the presumption of law would settle the issue in favor of the proponent of the presumption. Regarded in its evidential aspect, a given presumption of law may have either more or less of probative value, dependent upon the character of the presumption itself, and upon the circumstances of the particular case in which the issue may arise. Some legal presumptions are more probable and inherently stronger than others. So, also, differing circumstances may give differing degrees of probability to one and the same legal presumption. A promissory note is made to A. B., and it turns out there are two persons of that name in the community, — a father and son. The question of identity arises, and primarily, as fixing the burden of proof, the law says it is presumed the father was intended. Thus far the presumption is judicial and arbitrary. An issue is formed, and the son establishes, *prima facie*, that he and not the father was indicated, and the father then offers rebutting evidence. Now this issue, thus made, is to be determined by the weight of evidence, and upon the whole case, and in determining such issue the presumption has lost (unless there be an equilibrium) its merely arbitrary character, and is entitled only to its logical value. If A. B., the son, was at the date of the transaction involved in the controversy, a mere infant of tender years, wholly unacquainted with business affairs, and the father was engaged in the active pursuits of life, the probability that the father was meant is very great, and the legal presumption would have much more of probative force than it would have in a case where the son was a mature man and in active business, and the father aged and retired from business."

RULE 121. — And a presumption is neither continuous (A) nor retroactive (B).

Illustrations.

A.

I. A. brings an action against B. for enticing his minor son to enlist in the army. The question is as to the measure of damages, whether A. can recover for the loss of service until the end of his son's term (i.e., three years or the end of the war, which at the time is raging), or only to the time of the trial. *Held*, the latter, as the law can not presume that the war will continue to exist for three years or for any period.¹

II. In a suit for divorce it is shown that certain letters were written by the wife to a witness, three of them containing confessions of adultery. These letters were destroyed, while two subsequently received were handed to the custody of a third person. *Held*, that there was no presumption that these last letters were written on the same subject or contained similar confessions.²

“The enlistment,” it was said in case I., “was to end with the war, and the law will not presume in such a case that the war will continue three years. The law presumes that a fact continuous in its character still continues to exist until a change is shown, and so a state of war proved to exist three years ago is presumed in law to be still existing, unless the contrary be shown, but the law indulges no presumption at the present time that it will continue three years longer. On the contrary war is not the normal, but an exceptional state of society, and is generally regarded as a thing not to be desired either by individuals or nations. Peace is desirable and not war, and the presumption is that men and nations will do that which is for their interests and act with reference to them. The law, however, will not indulge in any presumption in regard to a future condition of war or peace. God alone knows what the future has in store for nations, and finite courts, whose visions can not penetrate the future, should not speculate as to its probabilities, much less attempt to solve them and make them the

¹ *Covert v. Gray*, 34 How. Pr. 450 (1866).

² *Strong v. Strong*, 1 Abb. Pr. (N. S.) 238 (1865.)

basis of their judgment. The rule is reasonable which presumes the continuance of an existing fact at the time of the trial, for the other party can overthrow it by proof if it be not so; but when it presumes a future continuance the party has no ability to unfold the future and give an answer by his proof."

In case II. it was said: "It was presumed that such letters, being part of a series as they are called, must have related to the same subject. I know of no principle upon which every friendly letter between the same parties is to be presumed in law to continue to advert to some one subject, or that confessions of guilt on that subject may be supposed to be reiterated or protestations of innocence inserted in every one; every thing is some time or other brought to an end, and every subject is sometimes absent from our thoughts or writings. Even a friend does not always continue to be confessor, and there is no experience of mankind which warrants the conclusion adopted in this case."

B.

I. A deed is signed in 1854 by Henrietta C., her maiden name. There is evidence that in 1860 she was known as Mrs. D. There is no presumption that she was married in 1854.¹

II. Harriet G. executes a deed in 1854. The question is whether she was married at the time. There is evidence that she was then over twenty-five years old. This raises no presumption that she was then married.²

III. Depositions out of the State are allowed to be taken before "any judge or justice of the peace." A commission is issued to Texas; depositions are taken before one B. on June 5, 1848; and it is officially certified on June 29th that B. is a justice of the peace. There is no presumption from this that B. held that office on June 5th.³

IV. A. made a contract in 1860. In 1864 he was insane. There is no presumption that he was insane in 1860.⁴

¹ *Erskine v. Davis*, 25 Ill. 251 (1861).

² *Erskine v. Davis*, 25 Ill. 251 (1861).

³ *Barrell v. Lytle*, 4 La. Ann. 557 (1849).

⁴ *Taylor v. Cresswell*, 45 Md. 423.

V. M. committed a burglary in 1880 in the house of J. In 1881, M. was tried and it appeared on the trial that J. was married. This raises no presumption that J. was married at the time of the burglary.¹

"The presumption of coverture," it was said in case I., "is prospective not retrospective. If we shall presume for the purpose of avoiding the deed executed by her in her maiden name, that she was married six years before we have any evidence that she was married at all, we might with the same propriety presume that she had been married sixteen years. Such is not the law."

In case III. it was said: "When the existence of a subject-matter or relation has been established, its continuance may be presumed. But here we are called upon to presume from the fact that a person was qualified to act as a justice at a particular date, that he was qualified so to act at a period anterior to that date. Such a presumption is not supported by reason or authority." In maritime law, a different rule seems to prevail. Thus a ship soon after leaving port becomes so leaky and disabled as to be unable to proceed. There is no evidence that she encountered any great storm or peril of the sea. The presumption is that she was unseaworthy when she sailed."²

In case V. it was said: "When the existence of a personal relation or a state of things continuous in its nature is once established by proof, the law presumes that such *status* continues to exist as before, until the contrary is proved, or until a different presumption is raised from the nature of the subject in question. But this presumption can not be permitted to operate retrospectively, so as to infer the prior existence of coverture or other like relationship from proof of its present existence. It may be that the party contracted the relationship within a few days before the trial."

Murdock v. State, 68 Ala. 567 (1881).

² Wright v. Orient Ins. Co., 6 Bosw. 370 (1860); 1 Arnould on Ins. 686, sec. 253.

RULE 122. — In the case of conflicting presumptions the presumption of payment is stronger than, and will prevail against, the presumption of continuance (A); the presumption of innocence is stronger than, and will prevail against, the presumption of payment (B), of the continuance of life (C), of the continuance of things generally (D), of marriage (E), and of chastity (F); the presumption of knowledge of the law is stronger than, and will prevail over, the presumption of innocence (G), and the presumption of sanity is stronger than, and will prevail over, the presumption of innocence (H).

Illustrations.

A.

I. See Illustration (B.)

B.

I. An action is brought on an administrator's bond to compel him to account for and pay over the amount of a private debt due from him to the intestate. Twenty-four years have elapsed since the bond was given. There is no proof of a decree of distribution ordering him to pay to the heirs. Therefore the presumption of payment and the presumption of innocence (arising from the fact that he would have violated his duty in paying without a decree) conflict, and the latter must prevail.¹

In case I. it was said: "It has been further contended that the facts furnished a legal ground on which the jury might have presumed that the defendant had paid or accounted to the heirs of the intestate for the amount of the notes without the formality of any proceeding in the probate court by way of a settled account and a decree thereon, and that the judge should have left this question to the jury. The obvious reply to this objection and argument, is that the law does not presume that an administrator does wrong; it does not presume that the defendant did

¹ *Potter v. Titcomb*, 7 Me. 303 (1831).

what by law he had no right to do, that is that he had made an unauthorized payment to the heirs under the circumstances mentioned. He was bound to account to the judge of probate, and he had no right to pay the heirs but under decree. To presume it would be to presume against law and right. We do not mean to say that had there been proof that the amount of the notes had been actually apportioned, and paid to the several heirs, though without a decree of the Probate Court, it might not, in a hearing in chancery, be a bar to an execution for anything beyond nominal damages. It would be as strange to sanction the presumption where mentioned as that which was relied upon in another part of the argument to prove that the intestate had forgiven the debt due on the notes. Wrongs and gifts are not to be presumed; they must be proved."

"Nothing can be clearer than this," says Mr. Justice Heath in an old case,¹ "a presumption may be rebutted by a contrary and stronger presumption."

C.

I. Mary B. married W., who afterwards enlisted and went on a foreign service and was never heard of afterwards; twelve months after his departure she married B. *Held*, that the issue of B. would be presumed legitimate.²

II. Title was claimed through A. and B., his wife; it was proved that B. had been married to C., who was dead, and that she had had three husbands before she married A.; the presumption was that these husbands were dead before she married A.³

In case I. the conflicting presumptions were the presumption of innocence and the presumption of the continuance of life. "If," said the court. "W. was alive at the time

¹ *Jayne v. Price*, 5 Taunt. 326 (1814).

² *King v. Inhabitants of Gloucestershire*, 3 Barn. & Ald. 386 (1819); *Lockhart v. White*, 18 Tex. 102 (1856); *Sharp v. Johnson*, 23 Ark. 79 (1860); *Greensborough v. Underhill*, 12 Vt. 604 (1839); *Cameron v. State*, 14 Ala. 546; 48 Am. Dec. 111 (1848); *Chapman v. Cooper*, 5 Rich. (L.) 452 (1852); *Yates v. Houston*, 3 Tex. 442 (1848); *People v. Feilen*, 58 Cal. 218 (1881); *Hull v. State*, 7 Tex. App. 508 (1890); *Murray v. Murray*, 6 Ore. 18 (1876).

³ *Breiden v. Paß*, 12 S. & R. (Pa.) 430 (1825).

of the second marriage, it was illegal and she was guilty of bigamy. If she had been indicted for bigamy, it would clearly not be sufficient. In that case, W. must have been proved to have been alive at the time of the second marriage. It is contended that his death ought to have been proved, but the answer is that the presumption of law is that he was not alive when the consequence of his being so is that another person has committed a criminal act.”¹

In case II. it was said: “In an old transaction like this, the fact of a second marriage is of itself some evidence of the death of the former husband. There are sometimes cases where it is unavoidably necessary to decide on the existence of facts without a particle of evidence on either side, and if a decision in a particular way would implicate a party to a transaction in the commission of a crime or any offense against good morals, it ought to be avoided, for the law will not gratuitously impute crime to any one, the presumption being in favor of innocence till guilt appear.”

In a Massachusetts case it was said: “The presumption of the wife’s innocence in marrying again might well overcome any presumption that a man not heard from for four years before the second marriage or for sixteen years after-

¹ The case which is often cited in connection with *King v. Inhabitants of Gloucestershire*, is *King v. Inhabitants of Harborne*, 2 Ad. & E. 540 (1835). There it appeared that one Ann Smith had, on April 11, 1831, been married to one Henry Smith, who deserted her. Smith had been previously married in October, 1821, to another female, with whom he lived until 1825, when he left her. But several letters had been received from her from Van Dieman’s Land, one of which bore date only twenty-five days previous to the second marriage. The court held that the presumption was that the first wife was living at the time of the second marriage. The decision in this case is evidently based on the very short time which transpired between the time when the first wife was shown to be alive and the date of the second marriage. And see *Lapsley v. Grierson*, 1 H. L. Cas. 500 (1848). In *Yates v. Houston*, 3 Tex. 433 (1848), where four years had elapsed since the former wife had been heard from, it was held that her death would be presumed to validate a subsequent marriage. And see *Lockhart v. White*, 18 Tex. 103 (1856). In *Wilkie v. Collins*, 48 Miss. 496 (1873), a husband left his home in Mississippi on October 30, 1869, and went to Louisiana on business, where he was last heard from by letter to his wife, November 30, 1869, announcing that he was then sick in bed, and would return as soon as he was able to travel. He was of habitual delicate health, and his domestic relations had always been most agreeable. It was the belief of his family that he was dead, and on December 22, 1861, his wife married again. It was held that the husband would be presumed to have been dead at that time. And see *Chapman v. Cooper*, 5 Rich. (S. C.) L. 453 (1852).

wards was alive and her lawful husband when she married the second time."¹

D.

I. A. and B., as husband and wife, sue C. for slander; they prove their marriage, but C. proves declarations of the wife that she had been married in Germany to another man. It will be presumed that the previous marriage has been dissolved by death or divorce.²

II. A. threatens to kill B.; some time after, B. kills A. There is no presumption that A.'s intention continued to that time.³

III. A. was indicted for illegally selling liquor; it was proved that it was sold, in his absence, by his clerk. The fact that the clerk had previously made similar sales, which A. had approved, does not raise the presumption that the last sale was with his consent.⁴

IV. A bankrupt in 1837, makes a scheduled return of his property. It is afterward discovered that in 1835 he owned certain property which was not included in the schedule. There is no presumption that he owned this property in 1837, for the presumption is that he did not commit a fraud.⁵

In case I. it was said: "There was no presumption that a marriage which was proved to have existed at one time in Germany continued to exist here after positive proof of a second marriage *de facto* here. The presumption of law is that the conduct of parties is in conformity to law until the contrary is shown. That a fact continuous in its nature will be presumed to continue after its existence is once shown is a presumption which ought not to be allowed to overthrow another presumption, of equal, if not greater force, in favor of innocence. * * * There was not any evidence that the first husband of Mrs. K. was still living, but if this had been established we think she was still entitled to the benefit of the favorable presumption that the first marriage had been dissolved by a divorce."

¹ Kelley v. Drew, 12 Allen, 107 (1866).

² Klein v. Landman, 39 Mo. 259 (1860).

³ State v. Brown, 64 Mo. 367 (1877).

⁴ Patterson v. State, 21 Ala. 571 (1853).

⁵ Powell v. Knox, 16 Ala. 634 (1849).

In case III. it was said : " We have no right to conclude that because he has sanctioned previous violations of the law he will continue to do so ; on the contrary, as every party is to be presumed innocent until his guilt is made manifest, we should presume that he repented his former transgression, and therefore did not assent to the subsequent violation."

Where the acts grow out of the illicit relations of the sexes, this rule does not appear to hold good, as the following illustrations will show : —

Illustrations.

I. A. and B. are indicted for living together in adultery ; the jury are instructed that where criminal intercourse is once proved it will be presumed, if the parties live under the same roof, to still continue. *Held*, correct.¹

II. B. and C. live together, the latter as B.'s mistress ; B. dies. That a marriage took place between them before his death will not be presumed.²

It has been said that while much will be presumed in favor of a marriage, after the removal of a barrier between parties who have been prevented from contracting it by a legal obstacle, no such presumption will arise where the parties were originally at liberty to form a legal or illegal union as they preferred. In such a case, having originally elected the criminal in preference to the lawful relationship, they must be presumed to have continued therein until some change of intention and wishes is affirmatively shown.³ This distinction renders such cases as those in the above illustration completely in harmony with cases like *Wilkinson v. Payne*, and others, noted under previous rules. In *Wilkinson v. Payne*,⁴ an infant contracted a void marriage and lived with his wife until her death, which occurred

¹ *Carotti v. State*, 42 Miss. 334 (1868).

² *Floyd v. Calvert*, 53 Miss. 46 (1876).

³ *Floyd v. Calvert*, 53 Miss. 46 (1876).

⁴ 4 T. B. 468.

only three weeks after he attained a legal age to marry, and it appeared that during the whole of that time she was on her death-bed. It was nevertheless held that a marriage would be presumed. The bar being removed, the presumption was in favor of innocence.

E.

I. A presumption of marriage arises from cohabitation; M. and Y. were proved to have lived together and cohabited; Y. afterwards married S. The presumption that Y. did not commit bigamy prevails over the presumption that M. and Y. were married.¹

II. In 1840, marriages between whites and negro slaves are prohibited under penalty of fine and imprisonment; it is proved that a negro slave and a white woman lived and cohabited together. The presumption is that the relation was that of concubinage and not of marriage.²

F.

I. W. was indicted for the seduction of E. under a statute punishing the seduction of "any unmarried female of previous chaste character." The previous chaste character of E. will not be presumed.³

"It is true," it was said in case I., "that ordinarily the reasonable and just presumption is in favor of female chastity. So is likewise the presumption in favor of moral honesty. Happily these presumptions are not only justified in all civilized nations, but nobly illustrated as well by the institutions of social life as by the laws enacted by government. Social intercourse is based upon the presumption of virtue, and society is obliged so far to conform to this law

¹ Clayton v. Wardell, 4 N. Y. 230 (1850); Case v. Case, 17 Cal. 598 (1861).

² Armstrong v. Hodges, 3 B. Mon. (Ky.) 70 (1841).

³ West v. State, 1 Wis. 209 (1853). But see State v. Wells, 48 Iowa, 671 (1878). In Slocum v. People, 90 Ill. 281 (1878), the prosecution was under a statute punishing the enticing away from home for the purpose of prostitution, of any unmarried woman of chaste life and conversation. In deciding the case the Supreme Court said: "The presumption of law is that her previous life and conversation were chaste, and the onus was upon the defendant to show otherwise." But the case shows that she was only eighteen years old, that previous to her seduction she had resided with her parents, went to school and church and mingled with good society, and she testified on the trial that she never had intercourse with any man but the defendant. This expression of the court was therefore unnecessary, as there was proof enough to rebut the presumption.

of its existence that even in its most corrupt state it is compelled to put on, at least, the form and semblance of virtue though its spirit may have departed. In every case in which the integrity of an individual is attacked the presumption of the law comes to his aid. Every person charged with crime is presumed innocent till he be proved guilty. Fraud is never to be presumed, but must always be proved. Every female charged with an offense, the essence of which is unchastity, is presumed to be chaste until the contrary appears. But these excellent and humane presumptions, so pregnant with the testimony which they bear to the dignity and honor of human nature, are always to be used, in the administration of justice, as a weapon of defense, not of assault. They are the shield of the accused, not the sword of the prosecutor. * * * The previous chaste character of the female is one of the most essential elements of the offense, made so by the express words of the statute in conformity with the suggestions of sound reason. A prostitute may be the subject of rape but not of seduction. It is the chastity of the female which the statute is designed to protect. The pre-existence of that chastity is the *sine qua non* to the commission of the crime. That is the subject of legal guardianship provided by this section. It is a substantive matter necessary to be averred and proved. If the prosecutrix were to change places, and were she indicted for lascivious conduct, then, indeed, the legal presumption would come to her aid and her chastity would be presumed. But when the State accuses one of its citizens with the violation of the chastity of another of its citizens by seduction, the law presumes the accused to be innocent of the entire offense until the contrary appears. The State can not be permitted to presume the immediate pre-existence of that chastity with the destruction of which the defendant is charged. One act of illicit intercourse affords no presumption that another has not preceded it. * * * The error consists in the instruction which the court gave the jury to the effect that the law presumed that she was pre-

viously of a chaste character, independent of any proof whatever. This is setting up a presumption on the part of the State, the prosecuting party, incompatible with the presumption which the law affords the defendant, and if the principle should prevail the presumption of the virtue of one citizen might work the condemnation of another in whose favor the law affords equal, and when charged with crime, even stronger presumption."

G.

I. All persons are presumed to know the common and statute law, and are responsible for its violation.¹ Ignorance of the law excuses no one and can not be pleaded as an excuse for the commission of a crime.

H.

I. A. is charged with a crime; the presumption is that A. was sane when he committed it, and if he wishes to be excused on the ground of non-responsibility, he must prove it.²

In case I., if A. was insane when he committed the act, he could not be punished, for an insane person can not commit a crime. If the presumption of innocence were general and without exception, the presumption would be that A. was insane — in other words that the act was not a crime; that he was innocent because he was non-responsible. But the presumption of sanity and the presumption of innocence coming in conflict, the latter must give way according to the best-considered doctrine on this question. The subject is an important one, and has led to much discussion. The decisions are not harmonious, and no question is more debated at the present time, when it arises for actual decision, than the question of the burden of proof of insanity in criminal cases. Three different views have been advanced. The first is, that inasmuch as every man is presumed to be sane, the burden of proof rests on the

¹ *Mayor of Baltimore v. Norman*, 4 Md. 253 (1853).

² *Cunningham v. State*, 56 Miss. 289 (1879).

party setting insanity up as a defense to establish this insanity beyond a reasonable doubt. This, it will be observed, entirely extinguishes the presumption of innocence in the conflict between that and the other presumption—the presumption of insanity. The second view likewise considers the presumption of innocence overthrown by the presumption of sanity, but holds that the presumption of sanity will prevail only until it is shown to be otherwise in the particular case by a preponderance of the evidence. In the third view the presumption of innocence prevails to a certain extent, for, in the jurisdictions where this view is favored, it is held that insanity being pleaded the burden of proof rests on the State to prove the sanity of the prisoner. It is not, however, held in the States which have adopted this view that insanity is presumed, but the rule is that if the prisoner gives any evidence to cast a doubt on his sanity, the State is obliged to prove his sanity beyond a reasonable doubt.

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